SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 232 and 240

[Release Nos. 33-11253; 34-98704; File No. S7-06-22]

RIN 3235-AM93

Modernization of Beneficial Ownership Reporting

AGENCY: Securities and Exchange Commission.

ACTION: Final rule; guidance.

SUMMARY: The Securities and Exchange Commission ("Commission") is adopting amendments to certain rules that govern beneficial ownership reporting. The amendments generally shorten the filing deadlines for initial and amended beneficial ownership reports filed on Schedules 13D and 13G. The amendments also clarify the disclosure requirements of Schedule 13D with respect to derivative securities. We also are expanding the timeframe within a given business day by which Schedules 13D and 13G must be filed, and separately requiring that Schedule 13D and 13G filings be made using a structured, machine-readable data language. Further, we discuss how, under the current rules, an investor's use of a cash-settled derivative security may result in the person being treated as a beneficial owner of the class of the reference equity security. We also are providing guidance on the application of the current legal standard found in Section 13(d)(3) and 13(g)(3) of the Securities Exchange Act of 1934 to certain common types of shareholder engagement activities. Finally, we are making certain technical revisions.

DATES: *Effective dates*: The amendments are effective on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Compliance dates: See Section II.G.

FOR FURTHER INFORMATION CONTACT: Nicholas Panos, Senior Special Counsel, and Valian Afshar, Senior Special Counsel, Division of Corporation Finance, at (202) 551-3440, U.S. Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

SUPPLEMENTARY INFORMATION: We are adopting amendments to 17 CFR 240.13d-1 ("Rule 13d-1"), 17 CFR 240.13d-2 ("Rule 13d-2"), 17 CFR 240.13d-3 ("Rule 13d-3"), 17 CFR 240.13d-5 ("Rule 13d-5"), 17 CFR 240.13d-6 ("Rule 13d-6"), 17 CFR 240.13d-101 ("Rule 13d-101"), and 17 CFR 240.13d-102 ("Rule 13d-102") under the Securities Exchange Act of 1934 [15 U.S.C. 78a *et seq*.] ("Exchange Act").[1] We also are adopting amendments to 17 CFR 232.13 ("Rule 13 of Regulation S-T") and 17 CFR 232.201 ("Rule 201 of Regulation S-T") under 17 CFR part 232 ("Regulation S-T").[2] In addition, we are rescinding 17 CFR 240.13d-7 ("Rule 13d-7").

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[1] Unless otherwise noted, when we refer to the Exchange Act, or any paragraph of the Exchange Act, we are referring to 15 U.S.C. 78a of the United States Code, at which the Exchange Act is codified, and when we refer to rules under the Exchange Act, or any paragraph of these rules, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which these rules are published.

[2] Unless otherwise noted, when we refer to Regulation S-T, or any paragraph of the rules thereunder, we are referring to title 17, part 232 of the Code of Federal Regulations [17 CFR part 232], in which these rules are published.

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I. Introduction

We are amending Regulation 13D-G[3] and Regulation S-T to modernize the beneficial ownership reporting requirements and improve their operation and efficacy. Some[4] of these amendments are based on the amendments that the Commission proposed in 2022 ("Proposed Amendments").[5] Specifically, we are adopting revisions to the deadlines for Schedule 13D and Schedule 13G filings. We also are adopting certain related technical changes to Regulation S-T that the Commission proposed in connection with these amendments. Further, we are requiring that Schedule 13D and 13G filings be submitted using a structured, machine-readable data language.

In response to the comments we received on the Proposed Amendments,[6] however, we

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3 Unless otherwise noted, when we refer to Regulation 13D-G, we are referring to title 17, part 240 of the Code of Federal Regulations [17 CFR part 240], in which 17 CFR 240.13d-1 through 13f-1 are published.

4 See *infra* note 22 for a discussion of certain technical amendments we are adopting that the Commission did not previously propose.

5 *See Modernization of Beneficial Ownership Reporting*, Release Nos. 33-11030; 34-94211 (Feb. 10, 2022) [87 FR 13846 (Mar. 10, 2022)] ("Proposing Release"). On Apr. 28, 2023, the Commission reopened the comment period for the Proposing Release in connection with the addition to the comment file of a memorandum prepared by staff of the Commission's Division of Economic and Risk Analysis. *See Reopening of Comment Period for Modernization of Beneficial Ownership Reporting*, Release Nos. 33-11180; 34-97405 (Apr. 28, 2023) [88 FR 28440 (May 4, 2023)] ("Reopening Release"). That memorandum provided supplemental data and analysis related to certain economic effects of the Proposed Amendments. *See* Memorandum of the Staff of the Division of Economic and Risk Analysis, *Supplemental data and analysis on certain economic effects of proposed amendments regarding the reporting of beneficial ownership* (Apr. 28, 2023), *available at* https://www.sec.gov/comments/s7-06-22/s70622-20165251-334474.pdf ("DERA Memorandum").

6 *See generally* letters submitted in connection with the Proposed Amendments, *available at* https://www.sec.gov/comments/s7-06-22/s70622.htm. Unless otherwise specified, all references in this release to comment letters are to comments submitted on the Proposed Amendments. Further, on June 22, 2023, the Commission's Investor Advisory Committee ("IAC") adopted recommendations ("IAC Recommendations") with respect to the Proposed Amendments. *See* U.S. Securities and Exchange Commission Investor Advisory Committee, Recommendation of the Market Structure Subcommittee of the SEC Investor Advisory Committee on SEC Proposed Amendments to Regulation 13D-G, Proposed Rule 10B-1, and Proposed Rule 9j-1 (June 22, 2023), *available at* https://www.sec.gov/files/spotlight/iac/20230622-recommendation-regarding-sec-proposed-amendments-regulation-13d-g-proposed-rule-10b-1-and.pdf. The IAC was established in Apr. 2012 pursuant to Section 911 of the Dodd-Frank Wall Street Reform and Consumer Protection Act [Pub. L. 111-203, sec. 911, 124

are making certain adjustments from the proposal. For example, we are not adopting proposed 17 CFR 240.13d-3(e) ("Rule 13d-3(e)") to deem certain holders of cash-settled derivative securities[7] as beneficial owners of the reference covered class.[8] Instead, we discuss how, under current Rule 13d-3, persons using these types of derivative securities may already be subject to regulation as beneficial owners. We also are not adopting many of the proposed amendments to Rules 13d-5[9] and 13d-6. Instead, we are issuing guidance on the application of the current legal standard found in Sections 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities.

With respect to the Schedule 13D and Schedule 13G filing deadlines, we are amending the following rules:

- 17 CFR 240.13d-1(a) ("Rule 13d-1(a)"): Shortening the filing deadline for the initial

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Stat. 1376, 1822 (2010)] ("Dodd-Frank Act") to advise and make recommendations to the Commission on regulatory priorities, the regulation of securities products, trading strategies, fee structures, the effectiveness of disclosure, and initiatives to protect investor interests and to promote investor confidence and the integrity of the securities marketplace. We discuss the IAC Recommendations in connection with the comments received on the Proposed Amendments below. *See infra* Sections II.A.1.b, II.A.2.b, II.B.2, and II.C.1.b. In addition, on Sept. 21, 2022, the IAC held a meeting that included a panel discussion on the Proposed Amendments. See the agenda for that meeting, including the panelists that discussed the Proposed Amendments, at https://www.sec.gov/spotlight/investor-advisory-committee/iac092122-agenda.htm.

7 As used in this release (including for purposes of proposed Rule 13d-3(e)), the term "derivative security" has the meaning set forth in 17 CFR 240.16a-1(c) ("Rule 16a-1(c)"). *See* Rule 16a-1(c) (defining "derivative securities" as including certain rights, such as options, warrants, convertible securities, stock appreciation rights, or similar rights "with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security," excluding certain enumerated rights, obligations, interests, and options). For purposes of proposed Rule 13d-3(e), the term "derivative security" would not have included a security-based swap, as defined in Section 3(a)(68) of the Exchange Act and the rules and regulations thereunder ("SBS"). As the context requires, references to "SBS" in this release includes both the singular ("security-based swap") and plural ("security-based swaps") form. *See* Proposing Release at 13864 & nn.110-114.

8 As used in this release, a "covered class" is a class of equity securities described in Section 13(d)(1) of the Exchange Act and Rule 13d-1(i) and generally means, with limited exception, a voting class of equity securities registered under Section 12 of the Exchange Act.

9 See *infra* note 22 and Sections II.C.2 and II.C.3 for a discussion of the proposed amendments to Rule 13d-5 that we are adopting.

Schedule 13D to within five business days[10] after the date on which a person acquires beneficial ownership of more than five percent of a covered class;[11]

- 17 CFR 240.13d-1(e), (f), and (g) ("Rules 13d-1(e), (f), and (g)"): Shortening the filing deadline for the initial Schedule 13D required to be filed by certain persons who become ineligible to report on Schedule 13G in lieu of Schedule 13D to five business days after the event that causes the ineligibility;
- 17 CFR 240.13d-1(b) and (d) ("Rules 13d-1(b) and (d)"): Shortening the deadline for the initial Schedule 13G filing for Qualified Institutional Investors ("QIIs")[12] and Exempt

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[10] The term "business day" currently is not defined in Section 13(d) or 13(g) or any rule of Regulation 13D-G. Accordingly, we are amending 17 CFR 240.13d-1(i) ("Rule 13d-1(i)") by adopting a new paragraph (2) that defines "business day" for purposes of Regulation 13D-G to mean any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m. eastern time. See *infra* notes 14 and 134 for further discussion of our new definition of "business day."

[11] Throughout this release, we refer to an initial Schedule 13D filing obligation as being incurred under Rule 13d-1(a) when a person "acquires beneficial ownership of more than 5% of a covered class," among other similar formulations. These formulations refer to the requirement in Rule 13d-1(a), which currently states that "[a]ny person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a [covered class], is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a . . . Schedule 13D."

[12] The institutional investors qualified to report on Schedule 13G, in lieu of Schedule 13D and in reliance upon Rule 13d-1(b), include a broker or dealer registered under Section 15 of the Exchange Act, a bank as defined in Section 3(a)(6) of the Exchange Act, an insurance company as defined in Section 3(a)(19) of the Exchange Act, an investment company registered under Section 8 of the Investment Company Act of 1940, a person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940, a parent holding company or control person (if certain conditions are met), an employee benefit plan or pension fund that is subject to the provisions of the Employee Retirement Income Security Act of 1974, a savings association as defined in Section 3(b) of the Federal Deposit Insurance Act, a church plan that is excluded from the definition of an investment company under Section 3(c)(14) of the Investment Company Act of 1940, non-U.S. institutions that are the functional equivalent of any of the institutions listed in Rules 13d-1(b)(1)(ii)(A) through (I), so long as the non-U.S. institution is subject to a regulatory scheme that is substantially comparable to the regulatory scheme applicable to the equivalent U.S. institution, and related holding companies and groups (collectively, "Qualified Institutional Investors" or "QIIs"). 17 CFR 240.13d-1(b)(1)(ii). In addition, under Rule 13d-1(b), in order to qualify to report on Schedule 13G in lieu of Schedule 13D, a QII must have acquired securities in the covered class in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. 17 CFR 240.13d-1(b)(1)(i).

Investors[13] to within 45 days[14] after the end of the calendar quarter in which beneficial ownership first exceeds five percent of a covered class;[15]

- 17 CFR 240.13d-1(c) ("Rule 13d-1(c)"): Shortening the deadline for Passive Investors[16] to file an initial Schedule 13G in lieu of Schedule 13D to within five business days after the date on which they acquire beneficial ownership of more than five percent of a covered class;
- 17 CFR 240.13d-2(a) ("Rule 13d-2(a)"): Revising the deadline for filing amendments to Schedule 13D to two business days after the date on which a material change occurs;
- 17 CFR 240.13d-2(b) ("Rule 13d-2(b)"): Shortening the deadline for Schedule 13G amendments filed pursuant to that provision to 45 days after the end of the calendar quarter in which a reportable change occurs;

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[13] The term "Exempt Investor" as used in this release refers to persons holding beneficial ownership of more than 5% of a covered class, but who have not made an acquisition of beneficial ownership subject to Section 13(d). For example, persons who acquire all of their securities prior to the issuer registering the subject securities under the Exchange Act are not subject to Section 13(d). In addition, persons who acquire no more than 2% of a covered class within a 12-month period are exempted from Section 13(d) by Section 13(d)(6)(B). In both cases, however, those persons are subject to Section 13(g). Amendments to Beneficial Ownership Reporting Requirements, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, n.8 (Jan. 16, 1998)]; *see also* Proposing Release at 13856, n.55.

[14] Any reference to "day" in this release means "calendar day," and those terms may be used interchangeably. Any reference to "business day" means "business day," as we are defining that term. See *supra* note 10 and *infra* note 134 for discussions of our new definition of "business day."

[15] In addition, we are retaining the requirement in Rule 13d-1(b)(2) that a QII file its initial Schedule 13G on a more expedited basis if its beneficial ownership exceeds 10% of a covered class. 17 CFR 240.13d-1(b)(2). We are amending that rule, however, to require that such an initial Schedule 13G be filed within five business days after the end of the first month in which the QII's beneficial ownership exceeds 10% of a covered class, computed as of the last day of the month, rather than the current requirement of 10 calendar days after month-end.

[16] The term "Passive Investors" as used in this release refers to beneficial owners of more than 5% but less than 20% of a covered class who can certify under Item 10 of Schedule 13G that the subject securities were not acquired and are not held for the purpose or effect of changing or influencing the control of the issuer of such securities and were not acquired in connection with or as a participant in any transaction having such purpose or effect. *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, n.9 (Jan. 16, 1998)]. These investors are ineligible to report beneficial ownership pursuant to Rules 13d-1(b) or (d) but are eligible to report beneficial ownership on Schedule 13G in reliance upon Rule 13d-1(c).

- 17 CFR 240.13d-2(c) ("Rule 13d-2(c)"): Shortening the filing deadline for Schedule 13G amendments filed pursuant to that provision to five business days after the end of the month in which beneficial ownership first exceeds 10 percent of a covered class, and thereafter upon any deviation by more than five percent of the covered class, with these requirements applying if the thresholds were crossed at any time during a month; and
- 17 CFR 13d-2(d) ("Rule 13d-2(d)"): Revising the deadline for Schedule 13G amendments filed pursuant to that provision to two business days after the date on which beneficial ownership exceeds 10 percent of a covered class, and thereafter upon any deviation by more than five percent of the covered class.

In addition, we are amending Rule 13d-2(b) to require that an amendment to a Schedule 13G be filed only if a "material change" occurs (replacing the current rule text that requires an amendment upon the occurrence of "any change" in the facts previously reported). Further, we are amending 17 CFR 232.13(a) ("Rule 13(a) of Regulation S-T") to permit Schedules 13D and 13G, and any amendments thereto, that are submitted by direct transmission commencing on or before 10 p.m. eastern time[17] on a given business day to be deemed to have been filed on the same business day.[18] This amendment should provide additional time for beneficial owners to prepare and submit their Schedule 13D or 13G filings.[19] The following table summarizes the changes we are adopting with respect to Schedule 13D and 13G filings, as described more fully

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17 When we refer to "eastern time" in this release, we mean eastern standard time or eastern daylight saving time, whichever is currently in effect.

18 This rule applies to filing deadlines expressed both in calendar days and in business days. For example, for filing deadlines expressed in calendar days, if the deadline falls on a Federal holiday, a Saturday, or a Sunday, then the filing may be made on the next business day thereafter. *See infra* note 268.

19 *See* Rule 13(a)(2) of Regulation S-T. We also are amending 17 CFR 232.201(a) ("Rule 201(a) of Regulation S-T") to make the temporary hardship exemption set forth in that rule—which applies to unanticipated technical difficulties preventing the timely preparation and submission of an electronic filing—unavailable to Schedules 13D and 13G, including any amendments thereto.

in Section II.A:

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Initial Filing Deadline	Within 10 days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f), and (g).	Within five business days after acquiring beneficial ownership of more than 5% or losing eligibility to file on Schedule 13G. Rules 13d-1(a), (e), (f), and (g).	QIIs & Exempt Investors: 45 days after calendar year-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: 10 days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: Within 10 days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).	QIIs & Exempt Investors: 45 days after calendar quarter-end in which beneficial ownership exceeds 5%. Rules 13d-1(b) and (d). QIIs: Five business days after month-end in which beneficial ownership exceeds 10%. Rule 13d-1(b). Passive Investors: Within five business days after acquiring beneficial ownership of more than 5%. Rule 13d-1(c).
Amendment Triggering Event	Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	Same as current Schedule 13D: Material change in the facts set forth in the previous Schedule 13D. Rule 13d-2(a).	All Schedule 13G Filers: Any change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).	All Schedule 13G Filers: Material change in the information previously reported on Schedule 13G. Rule 13d-2(b). QIIs & Passive Investors: Same as current Schedule 13G: Upon exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rules 13d-2(c) and (d).

Issue	Current Schedule 13D	New Schedule 13D	Current Schedule 13G	New Schedule 13G
Amendment Filing Deadline	Promptly after the triggering event. Rule 13d-2(a).	Within two business days after the triggering event. Rule 13d-2(a).	All Schedule 13G Filers: 45 days after calendar year-end in which any change occurred. Rule 13d-2(b). QIIs: 10 days after month-end in which beneficial ownership exceeded 10% or there was, as of the month-end, a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Promptly after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).	All Schedule 13G Filers: 45 days after calendar quarter-end in which a material change occurred. Rule 13d-2(b). QIIs: Five business days after month-end in which beneficial ownership exceeds 10% or a 5% increase or decrease in beneficial ownership. Rule 13d-2(c). Passive Investors: Two business days after exceeding 10% beneficial ownership or a 5% increase or decrease in beneficial ownership. Rule 13d-2(d).
Filing "Cut-Off" Time	5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.	All Schedule 13G Filers: 5:30 p.m. eastern time. Rule 13(a)(2) of Regulation S-T.	All Schedule 13G Filers: 10 p.m. eastern time. Rule 13(a)(4) of Regulation S-T.

As noted above, we are not adopting proposed Rule 13d-3(e). Instead, we discuss the circumstances in which a holder of a cash-settled derivative security, excluding SBS, may be deemed the beneficial owner of the reference covered class under Rule 13d-3. We also are not adopting the proposed exemption in 17 CFR 240.13d-6(d) ("Rule 13d-6(d)"), which the Commission proposed to enable certain persons to transact in derivative securities in the ordinary course of business without concern that they had formed a group under Section 13(d)(3) or 13(g)(3), in part because we are not adopting proposed Rule 13d-3(e).

To further clarify the disclosure requirements with respect to derivative securities, particularly cash-settled derivative securities, held by a person required to report on Schedule 13D, the Commission is adopting an amendment to Schedule 13D. Specifically, we are

amending Item 6 of Schedule 13D, codified at Rule 13d-101, to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security. This amendment is intended to eliminate any ambiguity regarding the scope of the disclosure obligations of Item 6 of Schedule 13D as to derivative securities, including with respect to any derivative not originating with, or offered or sold by, the issuer, such as a cash-settled option or SBS.

As noted above, we are not adopting most of the proposed substantive amendments to Rule 13d-5.[20] We also are not adopting proposed 17 CFR 240.13d-6(c) ("Rule 13d-6(c)"), which would have specified certain circumstances under which two or more persons may coordinate and consult with one another and engage with an issuer without being subject to regulation as a group. Instead, we are issuing guidance regarding the appropriate legal standard for determining whether a group is formed. This guidance is intended to provide clarity on the circumstances under which a person may be deemed to have formed a group with another person or persons within the meaning of Sections 13(d)(3) and 13(g)(3).

We are adopting the proposed requirement that Schedules 13D and 13G be filed using a structured, machine-readable data language. We are, therefore, now requiring that all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, on Schedules 13D and 13G be filed using an XML-based language.[21] This requirement is intended to make it easier for investors and other market participants to access, compile, and analyze information that is disclosed on Schedules 13D and 13G.

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[20] *But see infra* note 22 and Sections II.C.2 and 3 for a discussion of the proposed amendments to Rule 13d-5 that we are adopting.

[21] Under this structured data requirement, only the exhibits to Schedules 13D and 13G will remain unstructured.

Finally, we also are adopting certain technical revisions, some of which were not included among the Proposed Amendments.[22]

II. Discussion of the Final Amendments

A. Amendments to Rules 13d-1 and 13d-2 and Rules 13 and 201 of Regulation S-T to Revise Filing Deadlines and Filing Date Assignment

We are adopting a series of amendments to the deadlines for filing initial and amended beneficial ownership reports on Schedules 13D and 13G and expanding the timeframe within a given business day in which such filings may be timely made. These amendments are listed in Section I above and discussed in more detail below.

1. Rules 13d-1(a), (e), (f), and (g)

Section 13(d)(1) of the Exchange Act requires a disclosure statement to be filed "within ten days after [acquiring beneficial ownership of more than five percent of a covered class] or within such shorter time as the Commission may establish by rule."[23] Consistent with this

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[22] Specifically, as proposed, we are: (1) changing the title of Rule 13d-5 from "Acquisition of securities" to "Acquisition of beneficial ownership"; (2) revising 17 CFR 240.13d-5(a) ("Rule 13d-5(a)") to conform the text to the new title; (3) redesignating current Rule 13d-6 as new 17 CFR 240.13d-6(a) ("Rule 13d-6(a)"); and (4) redesignating current 17 CFR 240.13d-5(b)(2) ("Rule 13d-5(b)(2)") as new 17 CFR 240.13d-6(b) ("Rule 13d-6(b)"). The Commission did not receive any substantive comments on these amendments, so we are adopting them as proposed for the reasons set forth in the Proposing Release. We also are making other technical changes not included in the Proposing Release, namely: (1) rescinding in its entirety Rule 13d-7 because Congress already repealed the statutory requirements under Sections 13(d)(1), (d)(2), (g)(1), and (g)(2) for beneficial owners to deliver a copy of a Schedule 13D or 13G, and any amendments thereto, to the issuer of the covered class and any national securities exchanges where such equity securities are listed, *see* Pub. L. 111-203, 124 Stat. 1900 929R(a)(1)(B) through (4)(B) (2010); (2) making conforming amendments to Schedules 13D and 13G to remove the notes in those Schedules that refer to Rule 13d-7 and its requirements; (3) correcting incorrect cross references in Item 8 of Schedule 13G; and (4) replacing the gender-based pronouns used in Rules 13d-1, 13d-3, 13d-6, 13d-101, and 13d-102 with gender-neutral phrases and making additional conforming edits to the surrounding text as necessary. Although the Commission did not propose these amendments, we find good cause, in accordance with the Administrative Procedure Act ("APA"), Pub. L. 79-404, 60 Stat. 237 (June 11, 1946), that, in light of their technical nature, notice and public comment in respect of these amendments is impracticable, unnecessary, or contrary to the public interest. 5 U.S.C. 553(b)(3)(B).

[23] 15 U.S.C. 78m(d)(1).

provision, Rule 13d-1(a) sets forth the 10-day filing deadline for the initial Schedule 13D.[24] Although the Dodd-Frank Act amended Section 13(d)(1) to grant the Commission the authority to shorten the deadline for filing the initial Schedule 13D, the 10-day deadline has not been updated since it was enacted more than 50 years ago.[25]

Rules 13d-1(e), (f), and (g) set forth the initial Schedule 13D filing obligations for investors who are no longer eligible to rely upon Rule 13d-1(b)[26] or (c)[27] (which permit investors to file the more abbreviated Schedule 13G in lieu of the longer-form Schedule 13D). Rules 13d-1(e), (f), and (g) ensure that initial Schedule 13D filings uniformly are subject to a 10-day deadline, regardless of whether the beneficial owners were previously eligible to file a Schedule 13G in lieu of the Schedule 13D.

Rule 13d-1(e) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon either Rule 13d-1(b) or (c). Rules 13d-1(b) and (c) both provide that a person may not rely on those provisions if he or she beneficially owns the relevant equity securities with the purpose or effect of changing or influencing the control of the issuer.[28] Institutional and non-institutional beneficial owners who are unable to certify that they do not hold beneficial ownership for the purpose of or with the effect of changing or influencing the control of the issuer or in connection with any transaction that would have such purpose or

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24 17 CFR 240.13d-1(a) (requiring that a Schedule 13D be filed "within 10 days after the acquisition" of beneficial ownership of more than 5% of a covered class).

25 Section 13(d)(1) of the Exchange Act was enacted by the Ninetieth Congress in 1968 through the approval of Senate Bill 510.

26 17 CFR 240.13d-1(b).

27 17 CFR 240.13d-1(c).

28 The provision at 17 CFR 240.12b-2 ("Rule 12b-2 of Regulation 12B") defines the term "control" to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." The provision at 17 CFR 240.12b-1 sets forth the scope of Regulation 12B and provides that all rules contained in Regulation 12B "shall govern . . . all reports filed pursuant to section[ ] 13."

effect, as described more fully under Item 10 of Schedule 13G, or certain institutional investors that also acquire or hold beneficial ownership outside of the ordinary course of business, are considered to have, for purposes of this release, a "disqualifying purpose or effect."[29] Rule 13d-1(e)(1) requires such persons to file their initial Schedule 13D within 10 days of losing their Schedule 13G eligibility because they beneficially own a covered class with a disqualifying purpose or effect.

Similarly, Rule 13d-1(f) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance on Rule 13d-1(c). Rule 13d-1(c) provides that persons may not rely on that provision if they beneficially own 20 percent or more of a covered class. Rule 13d-1(f)(1) currently requires that such persons file their initial Schedule 13D within 10 days of losing their Schedule 13G eligibility because they beneficially own 20 percent or more of a covered class.

Finally, Rule 13d-1(g) applies to persons who have been filing a Schedule 13G in lieu of Schedule 13D in reliance upon Rule 13d-1(b). Only QIIs may rely on Rule 13d-1(b). Further, in order to rely on Rule 13d-1(b), a QII must beneficially own the relevant equity securities in the ordinary course of its business. Rule 13d-1(g) currently requires that such persons either file their initial Schedule 13D or amend their Schedule 13G to indicate that they are now relying on Rule 13d-1(c) (assuming they are eligible to rely on that rule) within 10 days of losing their Schedule 13G eligibility under Rule 13d-1(b) because they either no longer are a QII or no longer

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[29] Whether investors are engaged in activity with the purpose or effect of changing or influencing control of an issuer, and thus holding beneficial ownership with a disqualifying purpose or effect, ordinarily is a determination that would be based upon the specific facts and circumstances. For that reason, the Commission has not provided extensive guidance on this issue. The Commission has previously expressed the view that most solicitations in support of a proposal specifically calling for a change of control of the company (*e.g.*, a proposal to seek a buyer for the company or a contested election of directors or a sale of a significant amount of assets or a restructuring of a corporation) would clearly have that purpose and effect. For a more expansive discussion of the Commission's reasoning and factors to consider when making this determination, see *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854 (Jan. 16, 1998)].

beneficially own the relevant equity securities in the ordinary course of their business.

Rules 13d-1(e), (f), and (g) operate as regulatory safeguards that reestablish the application of Rule 13d-1(a) to beneficial owners who previously relied on Rule 13d-1(b) or (c). Under Rules 13d-1(e), (f), and (g), beneficial owners "shall immediately become subject to" Rules 13d-1(a) and 13d-2(a), which provisions are reinstated anew with respect to those persons the moment they become ineligible to rely upon Rules 13d-1(b) and (c).

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d-1(a) to require a Schedule 13D to be filed within five days after the date on which a person acquires beneficial ownership of more than five percent of a covered class. The Commission stated that the deadline for filing an initial Schedule 13D should be revised in light of advances in technology and developments in the financial markets and noted that shortening that deadline would be consistent with previous efforts to accelerate public disclosures of material information to the market.[30] The Commission also asserted that the proposed five-day deadline would maintain an appropriate balance between the requirement that material information be timely disseminated to investors and the competing interest that undue burdens not be imposed in the change of control context.[31] In addition, the Commission stated that it was mindful of the need to balance the market's demand for timely information and the administrative burden placed upon a filer to adequately and accurately prepare that information.[32] Finally, the Commission noted that the current 10-day filing deadline "contributes to information asymmetries that could harm

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30 Proposing Release at 13851.

31 *Id*.

32 *Id*. at 13852.

investors" and stated that shortening that deadline could increase transparency and provide assurance "that transactions are not being made based on mispriced securities caused by a prolonged lag in the dissemination of market-moving information," thereby improving investor confidence, market efficiency, and liquidity.[33]

In the Proposing Release, the Commission also proposed to amend the initial Schedule 13D filing deadline under Rules 13d-1(e)(1), (f)(1), and (g) for largely the same reasons that it proposed to amend Rule 13d-1(a). Specifically, the Commission proposed to make conforming revisions to Rules 13d-1(e), (f), and (g) so that persons who initially elected to report beneficial ownership on Schedule 13G, in lieu of a Schedule 13D, but subsequently lost their eligibility would be treated no differently from persons who make a Schedule 13D their initial filing.[34] Accordingly, the Commission proposed to amend Rules 13d-1(e), (f), and (g) to make the required Schedule 13D—or, in the case of Rule 13d-1(g), the amendment to Schedule 13G indicating that the filer is now relying on Rule 13d-1(c), if applicable—due no later than five days after the date on which the person became ineligible to report on Schedule 13G.[35]

b. Comments Received

Commenters[36] expressed a range of views on the proposed amendments to Rules 13d-

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33 Proposing Release at 13850, 13852.

34 *Id.* at 13854.

35 *Id*.

36 Throughout the release, in describing some of the comments we received on the Proposed Amendments, we focus on those commenters that responded to a specific request for comment or question raised in the Proposing Release or Reopening Release, or that addressed a specific Proposed Amendment. We note that several commenters expressed general support or opposition for the Proposed Amendments or raised concerns or made recommendations that are unrelated to or beyond the scope of the Proposed Amendments; we do not, however, summarize all of their comments in this release. For the sake of brevity, we also do not cite letters that substantially duplicate comments made in other letters that we cite in this release. For example, in response to the Reopening Release, a number of commenters submitted

1(a), (e), (f), and (g). A number of commenters supported shortening the deadline for filing an initial Schedule 13D from 10 days to five days.[37] Several commenters asserted that the proposed

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substantially identical letters generally supporting some of the Proposed Amendments and expressing concerns or making recommendations with respect to other parts of the Proposed Amendments. *See, e.g.*, Letter Type B, *available at* https://www.sec.gov/comments/s7-06-22/s70622-typeb.htm; Letter Type C, *available at* https://www.sec.gov/comments/s7-06-22/s70622-typec.pdf. We also note that several commenters submitted letters with substantially similar views as those expressed in Letter Type B, but with the letters worded sufficiently differently that they could not be consolidated with Letter Type B. *See, e.g.*, letter from Gerardo Cruz (June 27, 2023). We note the same with respect to Letter Type C. *See, e.g.*, letters from Chad Thompson (June 29, 2023); Bert Abanes (June 28, 2023). See *infra* note 37 for a discussion of Letter Type A. See *infra* note 458 for a discussion of Letter Type D and Letter Type E.

37 *See, e.g.*, letters from Committee on Federal Regulation of Securities of the Section of Business Law of the American Bar Association (Apr. 28, 2022) ("ABA") (expressly supporting only the proposed amendment to Rule 13d-1(a), but noting that "[t]he Committee is not unanimous in this view" and that "[t]here is support among some members of the Committee to further shorten the initial filing deadline to one or two calendar days" and that "there are other members of the Committee that suggest a five business day deadline is more appropriate"); Brandon Rees, Deputy Director of Corporations and Capital Markets, AFL-CIO (Apr. 11, 2022) ("AFL-CIO") (expressly supporting only the proposed amendment to Rule 13d-1(a)); Americans for Financial Reform Education Fund ("Apr. 11, 2022) ("AFREF") (same); Americans for Financial Reform Education Fund, American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), Communications Workers of America (CWA), Interfaith Center on Corporate Responsibility (ICCR), Public Citizen (June 27, 2023) ("AFREF, et al.") (same); Anonymous (Feb. 19, 2022) ("Anonymous 1"); Anonymous (Feb. 19, 2022) ("Anonymous 3"); Anonymous (Feb. 20, 2022) ("Anonymous 5"); Anonymous (Mar. 14, 2022) ("Anonymous 11"); Anonymous (Mar. 14, 2022) ("Anonymous 12"); Anthony R., Individual Investors (Feb. 18, 2022) ("Anthony R."); Better Markets (Apr. 11, 2022) ("Better Markets I") (same); Better Markets (June 27, 2023) ("Better Markets II") (same); Maria Ghazal, Senior Vice President and Counsel, Business Roundtable (Apr. 11, 2022) ("BRT") (same); Curtis Robinson (Feb. 18, 2022 ("C. Robinson"); Richard F. McMahon, Jr., Senior Vice President, Energy Supply & Finance Edison Electric Institute (Mar. 22, 2022) ("EEI"); An Investor, Engineer (Apr. 4, 2022) ("Engineer"); Mark R. Allen, Executive Vice President, FedEx Corporation (Apr. 12, 2022) ("FedEx"); Freeport-McMoRan Inc. / Douglas N. Currault II, Senior Vice President and General Counsel (Apr. 11, 2022) ("Freeport-McMoRan"); Tyler Gellasch, Executive Director, Healthy Markets Association (Mar. 22, 2022) ("HMA I"); Healthy Markets Association (Apr. 29, 2022) ("HMA II") (same); Jack Pieper (Feb. 21, 2022) ("J. Pieper"); Joshua Soucie, Managing Director, Singularity Acquisitions LLC (Feb. 21, 2022) ("J. Soucie"); Jonah (Feb. 18, 2022) ("Jonah"); Juan, Relationship Banker II (Feb. 19, 2022) ("Juan"); Brandon Rees, Deputy Director of Corporations and Capital Markets, AFL-CIO (June 6, 2022) ("Labor Unions") (same); Mark C. (Feb. 19, 2022) ("Mark C."); Mike (Feb. 23, 2022) ("Mike"); Jeffrey S. Davis, Senior Vice President and Senior Deputy General Counsel, Nasdaq, Inc. (Apr. 12, 2022) ("Nasdaq"); National Investor Relations Institute (Apr. 15, 2022) ("NIRI") (same); Phillip Worts (July 29, 2023) ("P. Worts"); Marc Steinberg, Radford Chair in Law and Professor of Law, Southern Methodist University (Feb. 22, 2022) ("Prof. Steinberg") (same); Society for Corporate Governance (Apr. 13, 2022) ("SCG") (same); Christina Maguire, President and Chief Executive Officer, Society for Corporate Governance and Matthew D. Brusch, President and CEO, National Investor Relations Institute (July 7, 2023) ("SCG & NIRI") (same); Tammy Baldwin, Sherrod Brown, Bernard Sanders, Elizabeth Warren, Tammy Duckworth, and Jeffrey A. Merkley, United States Senators (July 18, 2022) ("Sen. Baldwin, et al.") (same); SIFMA Asset Management Group, William Thurn, Managing Director, SIFMA AMG (Apr. 11, 2022) ("SIFMA AMG") (same); Theodore N. Mirvis, Adam O. Emmerich, David A. Katz, Sabastian V. Niles, Jenna E. Levine, and Carmen X. W. Lu (Feb. 10, 2022) ("T. Mirvis, et al."); Taj Reilly (Feb. 19, 2022) ("T. Reilly"); TIAA

amendments would increase the timeliness and quality of information for market participants.[38] A number of commenters asserted that the proposed amendments would increase transparency and fairness in the financial markets.[39]

Several commenters identified potential specific benefits of the proposed amendments. For example, some commenters asserted that the proposed amendments would be particularly beneficial for retail investors by providing them with additional information and transparency.[40] Another commenter stated that the proposed amendments would enable investors and the market to "better track when beneficial owners take significant positions in covered securities for purposes of controlling or exerting influence over issuers, resulting in more informed decision-making by investors and more accurate valuation of securities by the market."[41]

Other commenters highlighted potential downsides of the current 10-day deadline. For example, one commenter described the 10-day deadline as costly to public companies and investors generally and based its support for the proposed amendments "on the fundamental concept that a public company must have timely information about its owners in order to engage

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(Apr. 11, 2022) ("TIAA") (same); Todd (Feb. 19, 2022) ("Todd"); Wachtell, Lipton, Rosen & Katz (Apr. 11, 2022) ("WLRK I") (same); Wachtell, Lipton, Rosen & Katz (Oct. 4, 2022) ("WLRK II"); *see also* Letter Type B; Letter Type C. We note that commenters submitted a substantively identical version of the letter from Sen. Baldwin, et al. an additional 16 times. *See* Letter Type A, *available at* https://www.sec.gov/comments/s7-32-10/s73210-typeb.pdf. As such, every citation to the letter from Sen. Baldwin, et al. in this release should also be read as a citation to those additional 16 submissions of the substantively identical letter.

38 *See, e.g.*, letters from ABA; Anthony R.; FedEx; Freeport-McMoRan; Jonah; P. Worts; T. Mirvis, et al.

39 *See, e.g.*, letters from ABA; AFREF, et al.; Anonymous 5; Anonymous 12; Better Markets I; FedEx; Freeport-McMoRan; Labor Unions; Nasdaq; P. Worts; Sen. Baldwin, et al.

40 *See, e.g.*, letters from C. Robinson ("I welcome all rules that require more disclosure and faster times to report[]."); J. Soucie; P. Worts.

41 *See* letter from TIAA; *see also* letter from P. Worts.

with them effectively and respond promptly to their concerns."[42] Another commenter stated that "[i]nvestors' and market participants' abilities to prudently manage their positions and exposures is materially undermined by the arbitrary, unnecessary, discriminatory delay in reporting."[43]

Several commenters suggested that the proposed amendments would reduce information asymmetry among market participants.[44] Other commenters raised similar information asymmetry-based concerns regarding the 10-day filing deadline. For example, one commenter expressed concern that under the current deadline, pension funds are deprived of any short-term gains from hedge fund activism if they sell shares during the 10-day delay in disclosure of a beneficial ownership stake.[45] Another commenter asserted that the current 10-day deadline "disadvantages selling shareholders after the 5% threshold is reached and permits activist investors to ambush public companies, often by disclosing an ownership interest that far exceeds 5% of shares outstanding."[46] Further, one commenter suggested that the proposed amendments could help address information asymmetries that facilitate "stealth" accumulations at artificially low market prices, which purportedly transfer value from public investors to those activists engaged in seeking ownership, control, or influence over the target company.[47]

Other commenters supported the proposed amendments based on changes in technology

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42 *See* letter from SCG; *see also* letter from NIRI (stating that the proposal "would also ensure that public companies are not ambushed and are better prepared to respond to an activist investor who has accumulated a significant position over a relatively short period of time").

43 *See* letter from HMA I.

44 *See, e.g.*, letters from ABA; AFREF; AFREF, et al.; Better Markets II; Freeport-McMoRan; Nasdaq; NIRI; SCG; SCG & NIRI; *see also* Letter Type C. One of these commenters stated that "if the filing window is shortened, institutional investors will be better able to manage liquidity shocks in a way that serves their ultimate beneficiaries, instead of costing them money by unknowingly selling undervalued shares." *See* letter from AFREF, et al.

45 *See* letter from Labor Unions.

46 *See* letter from NIRI.

47 *See* letter from Better Markets I; *see also* letter from Better Markets II.

and developments in the financial markets.[48] For example, one commenter supported the proposal based on the "increasing effectiveness of activist campaigns and their decreased cost due to advances in information technology and the rise of concentrated economic ownership in the United States," citing "cost-effective activism" due to both the fact that "little more than 10 to 15 institutions are the target audience" and "the Commission's new universal proxy rule."[49] Similarly, other commenters described the current Schedule 13D filing deadline as "outdated."[50] One commenter agreed with the expressed concern in the Proposing Release that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today's financial markets.[51] One commenter cited an April 2020 survey it conducted of its members (composed of corporate officers and investor relations consultants) indicating that 82 percent supported modernization of the Schedule 13D filing deadlines.[52]

Several commenters noted that many foreign jurisdictions require beneficial ownership reporting on a shorter deadline than currently required under Regulation 13D-G.[53] One commenter disagreed with the notion expressed in the Proposing Release that the comparison of the beneficial ownership reporting deadline in the United States to foreign jurisdictions is imperfect because U.S. corporate law permits anti-takeover provisions that are not present in

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48 *See, e.g.*, letters from ABA; AFL-CIO; Better Markets I; BRT; C. Robinson; FedEx; Freeport-McMoRan; HMA I; HMA II; NIRI; SCG; Sen. Baldwin, et al.; T. Mirvis, et al.; T. Reilly; WLRK I; WLRK II; *see also* Letter Type B.

49 *See* letter from WLRK II. The commenter also noted that "successful activism campaigns have been run by stockholders with relatively small stakes, often below or well below 5%." *Id*.

50 *See, e.g.*, letters from Sen. Baldwin, et al.; T. Mirvis, et al.

51 *See* letter from BRT.

52 *See* letter from NIRI.

53 *See, e.g.*, letters from AFREF; Better Markets I; SCG; Sen. Baldwin, et al.; WLRK II.

those jurisdictions.[54] To the contrary, that commenter asserted that some of those foreign jurisdictions are even less "stockholder" and "activism" friendly than the United States, making corporate takeovers and activism more difficult, and described the corporate laws and corporate governance practices of those foreign jurisdictions as compared to the United States (focusing, in particular, on Delaware corporate law).[55] Other commenters noted that the proposed amendments would be consistent with similar Commission efforts to accelerate filing deadlines.[56]

A number of commenters asserted that the proposed amendments would not impose significant costs or burdens on beneficial owners of more than five percent of a covered class.[57] For example, one of those commenters stated that the compliance costs of the proposed amendments "are unlikely to be unduly burdensome, in a manner that outweighs the benefits" of the proposal given the nature of investors that generally file a Schedule 13D and the technology

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54 *See* letter from WLRK II.

55 *See id*. The commenter also presented statistics indicating that, notwithstanding the stricter beneficial ownership reporting obligations and purportedly increased inhibitions on shareholder activism, those foreign jurisdictions have experienced increased shareholder activism in recent years. *Id*. Some commenters, however, disagreed with and questioned the utility of this analysis of foreign jurisdictions. *See* letters from Jose Ceballos, Council for Investor Rights and Corporate Accountability (Dec. 20, 2022) ("CIRCA III"); Richard B. Zabel, General Counsel Chief Legal Officer, Elliott Investment Management L.P. (Nov. 21, 2022) ("EIM III"); *see also* letter from Richard B. Zabel, General Counsel Chief Legal Officer, Elliott Investment Management L.P. (June 27, 2023) ("EIM IV") (reiterating the points made in the commenter's letter dated Nov. 21, 2022). One of those commenters asserted that "regulatory structures, as well as cultural norms . . . mean that activism in non-U.S. markets is less prevalent than in the United States" which is "to the detriment of investors in those non-U.S. markets where, in many cases, there remains a lack of independent voices in the market able to hold boards and management accountable." *See* letter from EIM III. The commenter also stated that, because activism is less prevalent in those foreign jurisdictions than in the U.S., "[s]ome level of increased activist engagement in a handful of non-U.S. markets . . . does not mean that the Commission should seek to emulate regulatory structures in those other jurisdictions." *Id*. The other commenter noted that the analysis ignores that some of the cited foreign jurisdictions offer benefits to shareholders that the United States does not. *See* letter from CIRCA III.

56 *See, e.g.*, letters from SCG; WLRK I.

57 *See, e.g.*, letters from ABA; Anonymous 11; BRT; Freeport-McMoRan; J. Soucie; WLRK I.

available to them.[58] Another commenter agreed that the proposed amendments would be consistent in balancing investors' need for adequate disclosures with the burdens placed on filers to accurately prepare required disclosures.[59]

Several commenters stated that the proposed amendments would not significantly reduce shareholder activism.[60] For example, one commenter asserted that the proposed five-day deadline would not significantly impair the ability of activists to pursue their agendas.[61] Another commenter questioned whether there is an empirical basis for asserting that the proposed amendments would prevent shareholder activism and engagement.[62] Some commenters asserted that the proposed amendments would not interfere with shareholder activism on environmental, social, or governance ("ESG") issues because many such activists are not Schedule 13D filers.[63] One commenter was "not persuaded that a 10-day delay in beneficial ownership disclosure after acquiring a 5 percent stake is needed to incentivize . . . [a] large investor to be an activist

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58 *See* letter from WLRK I.

59 *See* letter from FedEx.

60 *See, e.g.*, letters from ABA; AFREF; Better Markets I; Better Markets II; HMA II; Labor Unions; Sen. Baldwin, et al.; WLRK I.

61 *See* letter from Better Markets I. The commenter stated that that many Schedule 13D filers currently do not avail themselves of the full 10-day filing period, many activists are effective in their campaigns without reaching the 5% beneficial ownership reporting threshold, and the proposed five-day deadline would give activists enough time to accumulate profits before public disclosure of their goals, enabling them to offset the costs of their activism. *Id*.; *see also* letter from Better Markets II (reiterating the point made in its first letter and citing the data and analysis in the DERA Memorandum for support).

62 *See* letter from HMA II.

63 *See* letters from Labor Unions; Sen. Baldwin, et al. One of those commenters noted that some of the most impactful ESG campaigns to date have occurred in Australia, where the beneficial ownership reporting deadline for a 5% stake is two business days, which "provides further evidence that a 10 day window is not needed to use shareholder activism to meaningfully change corporate behavior." *See* letter from Sen. Baldwin, et al. The Commission is not expressing any view as to whether the measures described by the commenters referenced herein would constitute activities undertaken for the purpose of changing or influencing control of an issuer. Nothing stated in this release changes or supersedes the Commission's prior guidance regarding whether certain soliciting activity has a control purpose or effect. *See supra* note 29.

investor."[64] And, one commenter asserted that the proposed amendments are "more likely to adversely affect short-term behaviors than long-term oriented activism."[65]

In addition, a number of commenters stated that shareholder activism is not uniformly beneficial for issuers and their shareholders.[66] For example, one commenter asserted that hedge fund activism could be contributing to an emphasis on short-term gains over sustainable, long-term growth that benefits longer-term investors.[67] One commenter noted that while a Schedule 13D filing by an activist may often lead to an immediate bump in the issuer's stock price, there is no compelling evidence that activist interventions deliver long-term value to shareholders.[68] One commenter asserted that the current 10-day deadline may discourage companies from going public, inhibiting capital formation, based on the threat of activism and "the burden of being subject to attacks by activist investors, a number of whom have short-term agendas."[69] One commenter stated that activist investors often pressure companies and their management to agree to their short-term demands that may or may not be in the long-term interests of shareholders, employees, and other stakeholders.[70] Further, one commenter cited a study indicating that activist hedge fund campaigns targeting public companies are associated with a reduction in jobs,

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64 *See* letter from AFL-CIO.

65 *See* letter from WLRK I.

66 *See, e.g.*, letters from AFREF; Better Markets I; HMA II; Labor Unions; NIRI; SCG; Sen. Baldwin, et al.; WLRK I.

67 *See* letter from AFREF. The commenter also noted that while hedge fund activism is associated with short-term increases in shareholder value, the evidence is much more mixed on the question of whether hedge fund activism results in long-term gains. *Id*.; *see also* letter from Better Markets I (stating that the benefits of shareholders seeking to acquire or influence corporate control and policy are mixed because some act out of short-term profit motives, not a desire to promote long-term value).

68 *See* letter from WLRK I.

69 *See* letter from SCG. The commenter also stated that although activists would have less time to buy additional shares after crossing 5% under the proposal, there is no shareholder protection rationale that would justify forcing other investors to subsidize activists' efforts to build larger positions in issuers. *Id*.

70 *See* letter from NIRI.

research and development spending, and capital expenditures, which arguably harms employees.[71]

Finally, commenters raised a variety of other points in support of the proposed amendments. For example, one commenter stated that the balance that Congress sought to strike in the Williams Act[72] was between activist investors seeking to change companies and those companies' management—not between an activist investor and a company's other investors.[73] One commenter stated that the proposed amendments could moderate the sudden, abrupt changes in corporate governance that often occur in issuers targeted by activist investors.[74] And, one commenter noted that the proposed amendments fall "squarely" within the Commission's legal authority under Section 929R of the Dodd-Frank Act and align with the Williams Act's intent because Congress chose a 10-day deadline to accommodate the practical challenges associated

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71 *See* letter from Labor Unions. The commenter also asserted that the proposed amendments would benefit pension funds based on a study it cited that found that while company value tends to increase in the first three years after being targeted by an activist hedge fund, these gains tend to be reversed in the fourth and fifth years. *Id*.; *see also* letter from Sen. Baldwin, et al. (citing the same study for the proposition that "research . . . shows the stock price increase [associated with an activist's Schedule 13D filing] is temporary and in fact the company is often in a weaker economic position post-activist intervention"). *But see* letter from International Institute of Law and Finance (Nov. 1, 2022) ("Profs. Bishop and Partnoy II") (critiquing the cited study, noting, among other things, that "a simple analysis of the data, not undertaken in that study, shows that employment levels at firms targeted by activists decrease substantially in the years prior to an activist intervention, violating the parallel trends assumption that is required to make any sort of causal inference from the empirical design").

72 Pub. L. 90-439, 82 Stat. 454 (July 29, 1968).

73 *See* letter from HMA II. The commenter also stated that there is no evidence or legitimate policy rationale to support a connection between the purported benefits of activist strategies generally on the one hand, and the purported need to preserve the ability of the small subset of investors engaged in them to be able to trade while in possession of material, non-public information to the detriment of other investors—for precisely 10 days. *Id.*

74 *See* letter from AFREF. The commenter stated that the proposed amendments could decrease the likelihood of issuers that are not targeted by activist investors taking preemptive steps (*e.g.*, overspending on short-term shareholder payouts and forgoing investments necessary for long-term financial health and growth) to avoid becoming targets of activism. *Id*. The commenter also asserted that the proposed amendments would benefit shareholders and other market participants by facilitating sound corporate governance. *Id.* For example, the commenter stated that a shortened filing deadline would help investors ensure their asset managers are fulfilling their fiduciary duties and help inform the education and advocacy efforts of those with a stake in proxy contests, shareholder resolutions, and other important votes. *Id.*

with preparing and filing a Schedule 13D.[75]

A number of commenters opposed shortening the initial Schedule 13D filing deadline to five days.[76] Several commenters expressed concern that the proposed amendments would disincentivize shareholder activism by reducing the amount of time that such shareholders have to accumulate positions in an issuer before filing a Schedule 13D, thereby depriving issuers and their shareholders of the positive benefits of such activism.[77] For example, one commenter stated that "if active shareholders are unable to establish an economically efficient pre-disclosure ownership stake, public company shareholders (and the economy more broadly) will be less likely to benefit from the improved stock price performance that often attends the monitoring and engagement activities pursued by engaged shareholders, given that such shareholders would have

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75 *See* letter from Better Markets I.

76 *See, e.g.*, letters from Adrian Day, RIA (Feb. 12, 2022) ("A. Day"); Daniel Austin, Director, U.S. Policy and Regulation, Alternative Investment Management Association (Apr. 11, 2022) ("AIMA"); Ben Mason (June 26, 2023) ("B. Mason"); Bernard Sharfman (Mar. 22, 2022) ("B. Sharfman") (expressly opposing only the proposed amendment to Rule 13d-1(a)); CIRCA (Apr. 11, 2022) ("CIRCA I") (same); CIRCA III (same); Milan Dalal, CIRCA (June 27, 2023) ("CIRCA IV") (same); Charles F. Pohl, Chairman, Dodge & Cox (Apr. 12, 2022) ("Dodge & Cox"); Edwin Fraser (Apr. 11, 2022) ("E. Fraser") (same); Susan Olson, General Counsel and Sarah Bessin, Associate General Counsel, Investment Company Institute (Apr. 7, 2022) ("ICI I"); Irenic Capital Management LP (Apr. 11, 2022) ("ICM") (same); Marcus Frampton (Mar. 16, 2022) ("M. Frampton") (same); Managed Funds Association (Apr. 11, 2022) ("MFA") (same); National Venture Capital Association (Apr. 11, 2022) ("NVCA") (same); Perkins Coie LLP (Apr. 12, 2022) ("Perkins Coie"); Jeffrey N. Gordon, Professor of Law, Columbia Law School (June 20, 2022) ("Prof. Gordon") (same); Robert Eccles and Shivaram Rajgopal (Mar. 31, 2022) ("Profs. Eccles and Rajgopal") (same); Alan Schwartz, Sterling Professor, Yale Law School and the Yale School of Management and Steven Shavell, Samuel R. Rosenthal Professor of Law and Economics, Harvard Law School Director, John M. Olin Center for Law, Economics & Business, Harvard University (Apr. 12, 2022) ("Profs. Schwartz and Shavell I") (same); Alan Schwartz, Sterling Professor, Yale Law School and the Yale School of Management and Steven Shavell, Samuel R. Rosenthal Professor of Law and Economics, Harvard Law School Director, John M. Olin Center for Law, Economics & Business, Harvard University (May 15, 2022) ("Profs. Schwartz and Shavell II") (same); Edward P. Swanson, Texas A&M University, Glen M. Young, Texas State University, and Christopher G. Yust, Texas A&M University (Feb. 19, 2022) ("Profs. Swanson, Young, and Yust") (same); Rolf Parta (Apr. 7, 2022) ("R. Parta") (same); Allison K. Thacker, President and Chief Investment Officer, Rice Management Company, Treasurer, William Marsh Rice University (Mar. 21, 2022) ("Rice Management") (same); Jennifer Nadborny, Simpson Thacher Bartlett LLP (Apr. 11, 2022) ("STB") (same); Donna Anderson, Marc Wyatt, and Bob Grohowski, T. Rowe Price (Apr. 11, 2022) ("TRP") (same).

77 *See, e.g.*, letters from AIMA; CIRCA I; CIRCA III; CIRCA IV; Dodge & Cox; ICM; MFA; Prof. Gordon; Profs. Eccles and Rajgopal; Profs. Schwartz and Shavell I: Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; Rice Management; TRP.

difficulty justifying certain engagements with issuers."[78] Similarly, another commenter asserted that the proposal would "mak[e] it more costly for blockholders to build a sufficient position to effect change" and "reduce the profitability of, and therefore the incentive to pursue, activist strategies," which would "reduce management's accountability to shareholders and corporate governance generally."[79] And another commenter stated that "although the SEC requires an activist buyer to disclose information that the buyer *has acquired*, the SEC fails to ask whether the buyer *would acquire* the information initially" and suggested that, under the proposed deadline, "the buyer would often be unlikely to make the original investment in information."[80]

In addition, one commenter expressed concern that the proposed amendments would disproportionately disincentivize shareholder activism that is targeted towards reforms other than a sale of the issuer.[81] Another commenter asserted that the proposed amendments would inhibit an activist investor's ability to make overtures to an issuer's management prior to public disclosure and to consult with other shareholders to ensure that shareholders' opinions and proposals are considered when approaching management.[82] And, one commenter stated that the proposed amendments would particularly disincentivize activism at medium- and small-cap

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78 *See* letter from ICM.

79 *See* letter from AIMA.

80 *See* letter from Profs. Schwartz and Shavell II (emphasis in original); *see also* letter from Profs. Schwartz and Shavell I.

81 *See* letter from Profs. Swanson, Young, and Yust. The comment letter also stated that if the proposed accelerated initial Schedule 13D filing deadline reduces activists' ability to profit from price discovery, the proposed amendments could reduce market efficiency. *Id.*

82 *See* letter from CIRCA I. In a separate letter, this commenter also disagreed with those supporting commenters that expressed concern about the negative effects that activists may have on targeted companies and cited data indicating that activist interventions benefit all shareholders in both the short- and long-term. *See* letter from CIRCA III.

companies because a larger economic position is needed to offset the activists' costs.[83]

Several commenters took issue with the information asymmetry concerns that the Commission expressed as a justification for the proposed amendments.[84] For example, one commenter cited data indicating that shareholders who sell during the period after an activist accumulates more than five percent beneficial ownership but before the activist files its Schedule 13D still generally benefit from that activist's accumulation because the stock price generally increases prior to the Schedule 13D filing.[85] Some commenters stated that the information asymmetry described in the Proposing Release is no different from the general asymmetry that exists in the market when any investor—activist or otherwise—determines to invest the time and resources to develop and then implement an investment thesis.[86] Similarly, some commenters asserted that information asymmetry is a quintessential element of the U.S. capital markets where investors are, and should be, entitled to profit from their analysis, hard work, and risk

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83 *See* letter from Prof. Gordon; *see also* letter from ICM (predicting a reduction in shareholder activism and related benefits for other shareholders and stating that the predicted "harms . . . will be most pronounced at micro-, small-, and mid-capitalization issuers . . . where the majority of active shareholder engagement occurs").

84 *See, e.g.*, letters from AIMA; CIRCA I; CIRCA III; CIRCA IV; Dodge & Cox; ICM; Prof. Gordon; Profs. Swanson, Young, and Yust; TRP. In addition, one commenter did not oppose the proposal but expressed concern about the information asymmetry-based justification. *See* letter from Elliott Investment Management L.P. (Apr. 11, 2022) ("EIM I"). That commenter stated, among other things, that "the suggestion that an activist's awareness of her confidential intention to build a position in a public company should prohibit her from trading is both illogical and inconsistent with established law" and contrasted the proposal with the "recently proposed short sale reporting rulemaking" in which "the Commission . . . expressly provided an alternative that protects the confidentiality of short sellers and their strategies, in recognition that disclosure would vitiate the value of their research." *Id.* (citing Short Position and Short Activity Reporting by Institutional Investment Managers, Release No. 34-94313 (Feb. 25, 2022) [87 FR 14950 (Mar. 16, 2022)] ("Short Position Reporting Proposal")); *see also* letter from Richard B. Zabel, General Counsel & Chief Legal Officer, Elliott Investment Management L.P. (Sept. 18, 2023).

85 *See* letter from Profs. Swanson, Young, and Yust.

86 *See, e.g.*, letters from CIRCA I; ICM; Prof. Gordon. These commenters also asserted that the Commission has long recognized the legitimacy of this asymmetry, including by allowing confidential treatment in Form 13F filings and in other contexts. *Id*.

taking.[87] Other commenters stated that selling shareholders are not forced to sell their shares and do so voluntarily, either seeking liquidity or because they have doubts about the issuer's prospects, and noted that such shareholders have the same access as the Schedule 13D filer to disclosures from both the issuer and insiders.[88] Some commenters asserted that the Commission ignored the fact that although some investors may miss out on selling at an appreciated price once the Schedule 13D is filed, a larger number of investors generally will benefit from the efforts of an activist.[89] Finally, one commenter asserted that the Williams Act was not intended to address information asymmetry-based concerns or the interests of shareholders who elect to sell prior to the disclosure of an initial Schedule 13D and cited to the legislative history and a U.S. Supreme Court decision to support such assertion.[90]

A number of commenters also disagreed with the Commission's technological advancement- and financial market development-based justifications for the proposed acceleration of the beneficial ownership reporting deadlines.[91] For example, some commenters asserted that neither Congress nor the Commission previously suggested that technological

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87 *See, e.g.*, letters from CIRCA I; ICM; Prof. Gordon.

88 *See, e.g.*, letters from AIMA; ICM. Similarly, one commenter noted the absence of data indicating that shareholders are harmed by the timing of when they sell a security under the current Schedule 13D reporting regime and posited that shareholders selling during the 10-day period are generally sophisticated, non-retail investors seeking liquidity based on an investment strategy which is unrelated (and indifferent) to disclosure indicating whether an activist has a stake in the company. *See* letter from CIRCA III.

89 *See* letters from AIMA; TRP.

90 *See* letter from ICM (citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975)); *see also* letters from B. Sharfman ("[T]he U.S. Supreme Court has repeatedly and unambiguously stated that the 'sole purpose' of the Williams Act was for the protection of investors who are confronted with a *cash tender offer*." (citing *Piper et al. v. Chris-Craft Industries, Inc.*, 430 U.S. 1 (1977)); EIM IV (citing *Rondeau*, 422 U.S. 49, for the same proposition, but not expressly opposing the proposal).

91 *See, e.g.*, letters from AIMA; CIRCA IV; Dodge & Cox; ICI I; ICM; Robert E. Bishop, Fellow, UC Berkeley School of Law Center for Law and Business, Frank Partnoy, Adrian A. Kragen Professor of Law, UC Berkeley School of Law (Apr. 11, 2022) ("Profs. Bishop and Partnoy I"); STB; *see also* letter from Investment Adviser Association (Apr. 11, 2022) ("IAA") (neither clearly supporting nor opposing the proposed amendments, but expressing certain concerns and making certain recommendations regarding the proposed amendments).

ability to file is or should be the primary basis to determine the appropriate filing deadlines for Schedules 13D and 13G.[92] One commenter asserted that the Commission has not made significant technological advances over the years to its own systems that market participants rely on to prepare Schedules 13D and 13G, making it challenging and costly for investors to gather the information about beneficial ownership they need to file Schedules 13D and 13G.[93] One commenter asserted that technological advances do not support shortening the filing deadline as proposed because despite advances in technology, the filing process still has numerous operational components that take time to complete.[94] Another commenter stated that recent trends indicate that activist investors are having a moderate and declining impact in the United States and, therefore, the Commission should "encourage new forms of activism, not suppress them."[95]

Several commenters expressed concerns that the proposed amendments do not align with the purpose or objectives of the Williams Act. For example, one commenter asserted that the proposed amendments "would necessarily be considered to be beyond [the Commission's] statutory authority and an 'abuse of discretion,' if not 'arbitrary and capricious' under the APA" because the proposed rule does not connect the proposed reduction in filing time with what the commenter described as the "sole purpose" of the Williams Act under Supreme Court precedent,

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92 *See, e.g.*, letters from AIMA; ICI I; ICM; STB.

93 *See* letter from ICI I.

94 *See* letter from IAA. The commenter cited legal developments since 1968, including various anti-takeover mechanisms and the adoption of Section 13(f) and Form 13F, as well as certain technological developments that provide public companies with the benefit of nearly-contemporaneous insight into their shareholder base and that have facilitated management entrenchment as offsetting factors to any technological advancements during that time period that would increase the ease of making a Schedule 13D filing. *Id*.

95 *See* letter from Profs. Bishop and Partnoy I. The commenter further said that "given the development of poison pills, public company boards are no longer monitored by hostile takeovers, so activism is the remaining recourse." *Id*.

namely the protection of shareholders confronted with a cash tender offer.[96] Another commenter stated that not all of the investors who file on Schedule 13D are activist investors engaging in the types of activities the Williams Act seeks to regulate.[97] Other commenters expressed concern that the proposed amendments would disrupt the balance that the Williams Act sought to strike.[98]

Some opposing commenters detailed the potential compliance burdens that the proposed amendments could impose. For example, some commenters expressed concern that the proposed five-day deadline would be unduly burdensome for smaller and non-institutional beneficial owners.[99] Other commenters asserted that the proposed amendments would present compliance challenges[100] and create significant reporting and monitoring burdens.[101] One commenter expressed concern that the proposed amendments could negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[102]

Other commenters raised various other concerns regarding the proposed amendments. For example, a number of commenters expressed concerns that the proposed amendments would

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96 *See* letter from B. Sharfman.

97 *See* letter from STB. The commenter noted that many Schedule 13D filers are former Exempt Investors who became disqualified to file on Schedule 13G because they acquired more than 2% beneficial ownership in a 12-month period. *Id*. The commenter also noted that many Schedule 13D filers are investors who seek a minority position and potentially a board seat (given their desire to more actively monitor their sizeable investment), but seek to work cooperatively with the issuer, with the goal of building shareholder value for all investors, and possess no intent to replace a majority of the board of directors, launch a tender offer, or make an offer to take the company private. *Id*.

98 *See* letters from CIRCA IV; ICM.

99 *See* letters from A. Day; E. Fraser.

100 *See* letter from NVCA.

101 *See* letter from Perkins Coie; *see also* letter from Jennifer W. Han, Executive Vice President, Chief Counsel & Head of Global Regulatory Affairs, Managed Funds Association and National Association of Private Fund Managers (July 24, 2023) ("MFA & NAPFM") (describing potential costs associated with the Proposed Amendments, but not expressly opposing the Proposed Amendments).

102 *See* letter from STB. For example, the commenter suggested that in order to avoid making a "late" filing with the Commission, beneficial owners may shift to boilerplate disclosures in their Schedule 13D filings, which can be prepared more quickly but are less useful to investors and regulators. *Id*.

increase management entrenchment and reduce shareholder engagement and corporate accountability.[103] One commenter stated that although "some purchasers may file within fewer than the required 10 days for Schedule 13D," that "does not justify accelerating the reporting timeline."[104] One commenter also noted that the proposed accelerated initial Schedule 13D filing deadline could result in activist investors relying more heavily on derivatives, such as total return swaps and call options.[105] One commenter asserted that the Commission has not provided a compelling justification for the proposed amendments or provided evidence to support its concerns regarding information asymmetries and reporting gaps that would warrant the proposed acceleration of the beneficial ownership reporting deadlines.[106] One commenter expressed concern that the proposed amendments would induce a front-running effect that would distort market pricing and increase market volatility.[107] Other commenters asserted that investors already have access to all of the volume and price data for publicly traded companies that they need to take appropriate action and, therefore, do not need additional information regarding holdings by significant beneficial owners.[108]

In addition, one commenter expressed concern that the Commission has not cited a market event or failure related to the existing beneficial ownership regime to support the

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103 *See, e.g.*, letters from AIMA; CIRCA I; CIRCA III; Dodge & Cox; ICM; M. Frampton; MFA; Rice Management; TRP.

104 *See* letter from AIMA. According to the commenter, "[m]ost investors will have a total aggregate investment in mind," and "[w]hen the investor reaches this level and exceeds the 5% threshold, she files her Schedule 13D," but "[t]his standard market practice in no way suggests that all other holders who are continuing to accumulate shares should be required to file earlier." *Id*.

105 *See* letter from Profs. Swanson, Young, and Yust.

106 *See* letter from ICI I.

107 *See* letter from Rice Management.

108 *See* letters from ICM; R. Parta.

proposed amendments.[109] That commenter distinguished the proposed amendments from other Congressional efforts to accelerate public disclosures based on the fact that the proposed amendments apply to unrelated, third-party investors rather than issuers or insiders.[110] Finally, one commenter asserted that the proposed amendments conflict with contract law in the United States, which generally refrains from imposing disclosure obligations on buyers of property.[111]

Some of the commenters that generally supported the proposed amendments also made various recommendations to the Commission. For example, one commenter recommended that the Commission require that an initial Schedule 13D be filed by the end of the day on which a person acquires beneficial ownership of more than five percent of a covered class.[112] Another recommended that the Commission require that an initial Schedule 13D be filed within one calendar day of a person acquiring three percent, rather than more than five percent, of a covered class and that a person be prohibited from acquiring more than three percent until one business day after filing a Schedule 13D.[113] Similarly, one commenter recommended that the Commission require that an initial Schedule 13D be filed within one business day after crossing the five percent threshold and institute a moratorium on the acquisition of beneficial ownership of additional equity securities of an issuer by any acquirer required to file a Schedule 13D that would be in effect from the acquisition of a five percent beneficial ownership stake until two

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109 *See* letter from AIMA.

110 *Id*. The commenter also stated that although some beneficial owners file a Schedule 13D before the end of the 10-day deadline, this does not support shortening the deadline because the decision as to when to file is based on each investor's target accumulation level. *Id*.

111 *See* letter from Profs. Schwartz and Shavell I.

112 *See* letter from Corey (Feb. 19, 2022) ("Corey").

113 *See* letter from Prof. Steinberg.

business days after filing the Schedule 13D.[114]

Other supporting commenters recommended that the Commission require that an initial Schedule 13D be filed within two business days, consistent with the filing deadline for a Form 4.[115] One supporting commenter recommended that the Commission require that an initial Schedule 13D be filed within three days rather than five days.[116] Other supporting commenters recommended that the Commission consider further shortening the beneficial ownership reporting deadlines without specifying an alternative filing deadline.[117]

In addition, some of the commenters that generally opposed the proposed amendments made various recommendations to the Commission. For example, one recommended that rather than shortening the Schedule 13D filing deadline, the Commission should impose a prohibition on tipping by an activist as soon as it reaches the five percent threshold until it files a Schedule 13D.[118] Another recommended that the Commission include an assets under management-based threshold for the proposed accelerated Schedule 13D filing deadlines.[119]

Other opposing commenters recommended that the Commission consider a "tiered

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114 *See* letter from WLRK I. The commenter asserted that the proposed five-day deadline will still substantially fail to serve the purpose of the Williams Act to require the timely release of information to the investing public with respect to the accumulation of substantial ownership of an issuer's voting securities. *Id*. According to the comment, this will "provide hedge funds and activist shareholders ample time to accrue significant stakes in an issuer and "improperly exploit, and profit from, information asymmetries at the expense of other public investors." *Id*. The commenter also stated that the moratorium is necessary to address information asymmetries and ensure the markets have time to assess impact of Schedule 13D filing and likened it to the 10-business day cooling off period applicable to Passive Investors switching from Schedule 13G filers to Schedule 13D filers. *Id*.

115 *See, e.g.*, letters from NIRI; SCG; SCG & NIRI; *see also* Letter Type C; letter from PL Salvati (Aug. 9, 2023) ("PL Salvati") (neither clearly supporting nor opposing the proposal, but recommending a two-business day deadline).

116 *See* letter from T. Reilly.

117 *See, e.g.*, letters from AFREF; Freeport-McMoRan; HMA I.

118 *See* letter from Prof. Gordon.

119 *See* letter from A. Day.

approach" to Rule 13d-1(a).[120] For example, one commenter suggested a tiered approach designed to vary the reporting deadline for an initial Schedule 13D based on the issuer's market capitalization without any limitation on acquisitions during the period between the time that the investor acquires more than five percent of a covered class and the time that the initial Schedule 13D is filed.[121] Another opposing commenter recommended that the Commission require those who cross certain thresholds (*e.g.*, 10 percent) or accumulate certain amounts after crossing five percent (*e.g.*, an additional three percent) to file on the more accelerated timeline, but allowing investors who trigger Schedule 13D filings for more technical reasons and who are not accumulating stock in connection with a potential activist engagement (*e.g.*, proxy contests or intended take-private activity) to continue filing under the current regime.[122]

Some opposing commenters recommended that if the Commission revises the initial Schedule 13D filing deadline, it should adopt a different deadline than proposed. For example, one commenter recommended that the Commission consider extending the filing deadline (e.g., to 15 or 30 days) rather than accelerating it.[123] One commenter recommended that the Commission require an initial Schedule 13D be filed within eight days rather than the proposed five days.[124] Other commenters recommended that the Commission require an initial Schedule

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120 *See* letters from ICM; STB.

121 *See* letter from ICM.

122 *See* letter from STB.

123 *See* letter from E. Fraser. The commenter also recommended that the Commission consider a provision for when a shareholder's position goes over the 5% threshold because of ordinary corporate actions that result in the number of outstanding shares to drop such that the shareholder unwittingly holds over the 5% of outstanding shares and recommended that the Commission consider increasing the threshold from greater than 5% beneficial ownership to 10%. *Id*.

124 *See* letter from MFA.

13D be filed in five business days rather than five calendar days.[125] Some of those commenters suggested that a five-business day deadline would be more appropriate in light of the steps required to prepare and file an accurate Schedule 13D,[126] and one commenter noted that most analogous securities laws governing reporting of material changes (*e.g.*, Form 8-K and Exchange Act Section 16 filings) require filings within time periods designated in business days rather than calendar days.[127]

Finally, some commenters that neither clearly supported nor opposed the proposed amendments made recommendations to the Commission. Several commenters recommended an alternative filing deadline than proposed, with some suggesting that the Commission require an initial Schedule 13D be filed within one day,[128] within two days,[129] five business days,[130] or on the same day as the event triggering the filing obligation.[131] Some commenters expressed a

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125 *See, e.g.*, letters from Dodge & Cox; ICI I; SIFMA AMG; STB; *see also* IAC Recommendations (recommending that the Commission adopt a five-business day deadline, rather than a five-calendar day deadline, for an initial Schedule 13D filing).

126 *See* letters from Dodge & Cox; ICI I.

127 *See* letter from STB; *see also* IAC Recommendations.

128 *See, e.g.*, letters from Jason Dunlop, Software Developer for the FAA (Feb. 19, 2022) ("J. Dunlop"); John Kennedy, Tax Paying American Citizen (Feb. 22, 2022) ("J. Kennedy"); Phillip, Retail Investor (Feb. 19, 2022) ("Phillip"). These commenters suggested that all beneficial ownership reports should be filed within one day. *See also* letter from Juan B. (Aug. 14, 2023) ("Juan B.") (recommending that the initial Schedule 13D and 13G filing deadlines under Rules 13d-1(a), (b), and (d) be shortened to one day).

129 *See* letter from Charles Jacobs, USCG (Feb. 20, 2022) ("C. Jacobs").

130 *See* letters from IAA; Profs. Bishop and Partnoy II; Robert Bishop, Associate Professor, Duke Law School, and Frank Partnoy, Adrian A. Kragen Professor of Law, UC Berkeley School of Law, Berkeley Haas (Affiliated Faculty) (June 27, 2023) ("Profs. Bishop and Partnoy III"). One of these commenters asserted that five calendar days would be extremely challenging for filers to obtain and verify all the information needed to ensure the accuracy and completeness of an initial Schedule 13D filing. *See* letter from IAA.

131 *See, e.g.*, letters from Chris McEntee, Retail Investor (Mar. 14, 2022) ("C. McEntee"); David Choate (Aug. 2, 2023) ("D. Choate"). These commenters suggested that all beneficial ownership reports should have a same-day filing deadline.

general preference for a deadline expressed in "business days" rather than "calendar days."[132] And, one commenter recommended that to the extent the Commission is concerned about Schedule 13D filers acquiring additional shares after crossing the five percent threshold without public disclosure, it should prohibit trading after crossing the five percent threshold rather than accelerating the filing deadlines.[133]

c. Final Amendments

We are amending Rules 13d-1(a), (e), (f), and (g) to shorten the initial Schedule 13D filing deadline. We are adopting a five-business day[134] deadline, however, rather than the proposed five-calendar day deadline based on the input we received from commenters.

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132 *See, e.g.*, letters from IAA; Profs. Bishop and Partnoy III. One of these commenters recommended that the Commission use business days to give filers sufficient time to analyze and prepare Schedules 13D and 13G and make it more likely that the Commission, issuers, and the marketplace will receive beneficial ownership information that is accurate and complete and asserted that the use of business days instead of calendar days when establishing the filing deadlines will not have a detrimental impact on the proposed benefits of shorter deadlines. *See* letter from IAA. Another of these commenters expressed the belief that "there is now a broad consensus that the final rule should be framed in terms of business (or trading) days." *See* letter from Profs. Bishop and Partnoy III.

133 *See* letter from Committee on Securities Law of the Business Law Section of the Maryland State Bar Association (Apr. 11, 2022) ("MSBA").

134 The term "business day" is not defined in Section 13(d) or 13(g) or any rule of Regulation 13D-G. Accordingly, in the Proposing Release, the Commission proposed to define "business day" for purposes of Regulation 13D-G to mean any day, other than Saturday, Sunday, or a Federal holiday, from 6 a.m. to 10 p.m. eastern time. Proposing Release at 13847, n.5. One commenter addressed this proposal, expressing concern that the proposed definition of "business day" could raise confusion as to on which business day a material change occurred if the event took place outside of the hours set forth in that definition (*i.e.*, 6 a.m. to 10 p.m. eastern time). *See* letter from EIM I. Accordingly, the commenter recommended that the "business day" definition comprise the full 24-hour period of any given day based on the customary definition of the term. *Id.* To avoid the concern expressed by this commenter, we are adopting the commenter's recommendation. As such, the term "business day" for purposes of Regulation 13D-G will be defined to mean any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m. eastern time. We believe this will avoid any confusion as to the date on which a beneficial ownership report is due if, for example, a person incurs a filing obligation before 6 a.m. or after 10 p.m. on a day that is not a Saturday, Sunday, or Federal holiday. It is important to note, however, as stated at the outset of Regulation 13D-G, that Regulation S-T governs the preparation and submissions of filings in electronic format and should be read in conjunction with the rules contained within Regulation 13D-G, including Rules 13d-1 and 13d-2. Thus, even though the definition of "business day" encompasses an entire day, a Schedule 13D or 13G must be submitted by direct transmission to the Commission in accordance with the times set forth in Rule 13(a) of Regulation S-T in order to be deemed to have been filed on that day. See *infra* Section II.A.5 for a more detailed discussion of Rule 13(a) of Regulation S-T, including the amendments we are adopting to extend the filing "cut-off" time for Schedules 13D and 13G.

As noted above, Rule 13d-1(a) currently requires an initial Schedule 13D to be filed within 10 days after the date on which a person acquires beneficial ownership of more than five percent of a covered class.[135] We are amending Rule 13d-1(a) to require a Schedule 13D to be filed within five business days after the date[136] of such acquisition. Similarly, as discussed above, Rules 13d-1(e), (f), and (g) currently require an initial Schedule 13D to be filed within 10 days after the date on which a person loses its Schedule 13G eligibility. We are amending those rules to require such Schedule 13D to be filed within five business days after such date.

For purposes of determining the filing deadline under these amendments, the Commission must receive the filing by the fifth business day *after* the date on which the initial Schedule 13D filing obligation arises—*i.e.*, the date on which a person acquires beneficial ownership of more than five percent of a covered class under Rule 13d-1(a) or the date on which

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135 Under Section 21 of the Exchange Act, the Commission has the authority to investigate and enforce violations of Section 13(d)(1) and Rule 13d-1(a) and may seek to impose various remedies for late filings, such as injunctive relief, cease-and-desist orders or civil monetary penalties. Importantly, no state of mind requirement exists for violations of Section 13(d)(1) and corresponding Rule 13d-1(a). *See SEC v. Levy*, 706 F. Supp. 61, 63-69 (D.D.C. 1989) (holding a defendant liable notwithstanding the defendant's assertion that his attorney "misinformed defendant about his obligation to disclose" information on Schedule 13D because scienter is not an element of such violations); *see also SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1167 (D.C. Cir. 1978) ("Indeed, the plain language of section 13(d)(1) gives no hint that intentional conduct need be found, but rather, appears to place a simple and affirmative duty of reporting on certain persons. The legislative history confirms that Congress was concerned with providing disclosure to investors, and not merely with protecting them from fraudulent conduct."); *Oppenheimer & Co., Inc.*, 47 SEC 286, 1980 WL 26901, at *1-2 (May 19, 1980) ("We have previously held that the failure to make a required report, even though inadvertent, constitutes a willful violation."). To the extent a person willfully fails to comply with Section 13(d), a beneficial owner also has exposure to criminal liability under Section 32(a) of the Exchange Act.

136 We also are revising Rule 13d-1(a) to state that the initial Schedule 13D must be filed within five business days "after the date of such acquisition" rather than the current formulation of "after such acquisition." This modification, which the Commission proposed, is intended to clarify that, for purposes of determining the filing deadline, the first day in the five-business day count towards reaching the deadline is the day *after* the date on which beneficial ownership of more than 5% is acquired (rather than the date of such acquisition). We also are adopting similar changes to Rules 13d-1(c) and (f)(1), as those rules currently contain language similar to the "after such acquisition" formulation currently in Rule 13d-1(a). We do not believe that a similar change is required for Rules 13d-1(e) and (g), as those rules use different formulations. *See* 17 CFR 240.13d-1(e)(1) and (g) (currently requiring an initial Schedule 13D be filed "within 10 days" of the filing trigger date).

a person loses eligibility to file on Schedule 13G under Rules 13d-1(e), (f), and (g)—in order for the filing to be considered timely. Pursuant to our amendment to Rule 13(a)(4) of Regulation S-T, discussed in Section II.A.5 below, the filing will have to be submitted by direct transmission commencing on or before 10 p.m. eastern time on the due date.[137]

We believe the current 10-day filing deadline for an initial Schedule 13D filing should be revised to ensure investors receive material information in a manner that is considered timely in light of advancements in technology and developments in the financial markets that have occurred since that deadline was enacted in 1968. Those technological advancements include, for example, market professionals' use of information technologies to compile the necessary data and prepare a filing,[138] as well as their ability to submit filings electronically through the Commission's Electronic Data Gathering, Analysis, and Retrieval ("EDGAR") system.[139] In

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137 *See infra* Section II.A.5 for a discussion of our amendment to Rule 13(a)(4) of Regulation S-T, which extends the filing "cut-off" time for Schedules 13D and 13G from 5:30 p.m. eastern time to 10 p.m. eastern time.

138 *See, e.g.*, letters from Better Markets I (noting "technological advancements over the last 54 years [that] have reduced the need for a 10-day reporting period," including "vastly more efficient data compilation methods"); SCG (noting that "[e]very fund manager with the resources to amass a 5% stake in a company should have sufficient record-keeping technology to determine" the amount of their beneficial ownership in a rapid manner); Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite? A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1895, 1960-61 (2017) (describing the "disclosure regime under Section 13 of the Securities Exchange Act" as "antiquated" and stating that "[i]t seems entirely clear to me that the idea of Section 13 was that an investor should come public as soon as reasonably possible after hitting the 5% threshold and that the reporting deadline was due to what it took to type up, proof, and deliver to Washington the required filing in 1968, when word processors and electronic filing with a button push did not exist").

139 In mandating that all Schedules 13D and 13G be filed electronically, the Commission reasoned that such a transition was necessary to facilitate "more rapid dissemination of, and easier access to, financial and other material information . . . than under our current paper filing system" and cited to "increased efficiencies in the filing process, which will significantly reduce the filing time required under traditional methods of paper delivery." *See Rulemaking for EDGAR System*, Release No. 34-35113 (Dec. 19, 1994) [59 FR 67752 (Dec. 30, 1994)]; *Mandated EDGAR Filing for Foreign Issuers*, Release No. 34-45922 (May 14, 2002) [67 FR 36678 (May 24, 2002)]; *see also* Adam O. Emmerich et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, 3 HARV. BUS. L. REV. 135, 143 (2013) (noting that the 10-day Schedule 13D filing deadline reflected "commercial and technological realities that existed in 1968, [which] would have included the

addition, the use of modern information technology and other developments in the financial markets may facilitate an investor's accumulation of a large equity stake more quickly than at the time Congress enacted the Williams Act.[140] Before 1993, "the prevailing practice" was to "settl[e] securities transactions within five business days of trade date."[141] Since then, the Commission has shortened the settlement cycle three times, most recently adopting rule amendments this year that require settlement of most transactions in securities within one business day after the trade date (with which compliance will be required by May 28, 2024).[142] Because a shortened settlement cycle enables investors to access the proceeds of their transactions more quickly, investors also may be able to acquire a significant equity stake more quickly than when settling their transactions within five business days of trade date.[143] Congress, in the Dodd-Frank Act, expressly empowered the Commission to shorten the deadline for filing

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time required to mail the Schedule 13D to the SEC's office"); letter from Wachtell, Lipton, Rosen & Katz to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Mar. 7, 2011) ("Wachtell Petition") at 1-7, *available at* https://www.sec.gov/rules/petitions/2011/petn4-624.pdf (petitioning the Commission to propose amendments to the beneficial ownership reporting rules to, among other things, shorten the Schedule 13D filing deadline from 10 days to one business day based, in part, on "[c]hanges in technology, acquisition mechanics and trading practices [that] have given investors the ability to make these types of reports with very little advance preparation time" and the fact that "the markets rely on the expectation that material information wil1 be disseminated promptly and widely, in no small part due to the impact of the internet and online information exchange").

140 *See, e.g.*, letter from SCG. This commenter noted, for example, that "investment managers [in 1968] didn't have access to email, instant messaging, fax machines, market data terminals, computer-assisted trading technology, or alternative 'dark pool' trading venues that help facilitate the accumulation of significant positions." *Id*. The commenter also noted that "[d]aily trading volumes on U.S. exchanges, which averaged 22 million shares in 1968, have grown by more than 1,000 times." *Id*.

141 *Shortening the Securities Transaction Settlement Cycle*, Release No. 34-96930 (Feb. 15, 2023) [88 FR 13872, 13873 (Mar. 6, 2023)].

142 *Id*. at 13873, 13916.

143 *See* letter from SCG ("Fifty-four years ago, there was no standard period for settling securities trades; today the settlement cycle is two business days and the Commission recently proposed shortening that period further to 'T+1' (one business day) by 2024 to reduce risks to investors."). See also *infra* text accompanying note 677 for further discussion of some ways in which investors may be able to acquire a significant equity stake more quickly in today's financial markets.

the initial Schedule 13D.[144] Because of those advances in technology and developments in the financial markets, we are now exercising that authority to shorten the initial Schedule 13D filing deadline.

We note that our shortening of the initial filing deadline for Schedule 13D is consistent with previous Congressional and Commission efforts to accelerate public disclosures of material information to the market.[145] For example, in 2002, when the Commission accelerated the deadlines for issuers to submit their periodic reports, it reasoned that "[s]ignificant technological advances over the last three decades have both increased the market's demand for more timely corporate disclosure and the ability of companies to capture, process and disseminate this information."[146] Similarly, the Commission has long recognized the benefits of more expedient

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144 Pub. L. 111-203, 124 Stat. 1900 929R(a)(1)(A) (2010).

145 For example, the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act") amended Section 16(a) of the Exchange Act to require that change of beneficial ownership reports under Section 16(a) of the Exchange Act be filed by officers, directors and beneficial owners of more than 10% of a covered class "before the end of the second business day following the day on which the subject transaction has been executed." On Aug. 27, 2002, the Commission adopted amendments to implement the accelerated deadline for Form 4 filings, shortening the deadline from 10 days after the close of each calendar month to two business days after a filing obligation is triggered. *See Ownership Reports and Trading by Officers, Directors and Principal Security Holders*, Release No. 34-46421 (Aug. 27, 2002) [67 FR 56461 (Sept. 3, 2002)]. On Mar. 16, 2004, the Commission amended Form 8-K to generally require that such filings be made within four business days of a triggering event. In adopting the accelerated timeline, the Commission explained the amended requirement "should enhance investor confidence in the financial markets." *Additional Form 8-K Disclosure Requirements and Acceleration of Filing Date*, Release No. 34-49424 (Mar. 16, 2004) [69 FR 15593 at 15611 (Mar. 25, 2004)]. The Commission further explained that "[t]he requirement of enhanced, timely disclosure should raise investors' expectations regarding the amount and timing of information that reporting companies must make available to the public" and that "[c]onfidence in the expectation of such enhanced disclosure should provide more certainty to those investors that they are making investment decisions in a more transparent market, which should reduce market volatility as a result of uncertainty of the availability of accurate timely information about public companies." *Id.*

146 *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, Release No. 34-46464 (Sept. 5, 2002) [67 FR 58479 (Sept. 16, 2002)]. We recognize that these accelerated deadlines applied to periodic filings made by issuers, whereas Sections 13(d) and (g) relate to filings made by investors. *See supra* note 110 and accompanying text. We also recognize that the acceleration of these deadlines was prompted, in part, by Section 409 of the Sarbanes-Oxley Act, which "added Section 13(l) of the Exchange Act . . . [to] require[] disclosure on a *rapid and current* basis of such additional information concerning material changes in the financial condition or operations of the issuer," *id.* at n.15 and

reporting, stating, for example, that "a lengthy delay before . . . information becomes available makes the information less valuable to investors."[147]

Despite those efforts to accelerate various other reporting deadlines, the initial Schedule 13D filing deadline has remained unchanged since its enactment in 1968. As a number of commenters pointed out, there have been significant changes in technology and developments in the financial markets in the intervening years that have rendered the 10-day deadline "outdated."[148] Commenters also highlighted some costs that the current 10-day deadline may be imposing on market participants (*i.e.*, by delaying the disclosure of potentially material information)[149] and identified some potential benefits of shortening that deadline, including increased timeliness of information and improved transparency and fairness in the financial markets.[150] We agree with those commenters that shortening the initial Schedule 13D filing deadline will increase the timeliness of the disclosure of material information, thereby improving market transparency, facilitating better-informed decision-making by investors, and enhancing the efficiency of resource allocation (*i.e.*, the direction of capital and other resources to their

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accompanying text (emphasis added), whereas no such "rapid and current" language exists in Sections 13(d) and 13(g). Nonetheless, the technological advances that have increased both the market's demand for more timely disclosure and the ability of issuers to file more rapidly are equally applicable to the information disclosed on Schedule 13D and available to investors making Schedule 13D filings. For example, Congress recognized the market's demand for more timely disclosure of non-issuer filings by accelerating the deadline for Section 16 filings in the Sarbanes-Oxley Act. *See supra* note 145. As such, we believe that these technological advances and market practices also support accelerating the initial Schedule 13D filing deadline.

147 *Acceleration of Periodic Report Filing Dates and Disclosure Concerning Website Access to Reports*, Release No. 34-46464 (Sept. 5, 2002) [67 FR 58479, 58483 (Sept. 16, 2002)]; *see also* H.R. Rep. 90-550 (1967) ("The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. The bill is designed to make relevant facts known so that shareholders have a fair opportunity to make their decision.").

148 *See supra* notes 48-52 and accompanying text.

149 *See supra* notes 42-43 and accompanying text.

150 *See supra* notes 38-41 and accompanying text.

most productive uses) across the economy.[151]

We recognize that several commenters opposed the proposed amendments to Rules 13d-1(a), (e), (f), and (g). Some commenters asserted that neither Congress nor the Commission previously suggested that technological ability to file should be the primary basis to determine the appropriate initial Schedule 13D filing deadline.[152] There is some indication, however, that when enacting the 10-day deadline, Congress considered the amount of time a beneficial owner would need to prepare and submit a filing.[153] As noted above, there have been significant technological advancements since 1968 that have made it easier to prepare and file a Schedule 13D more quickly.[154] There also is some indication that Congress enacted Section 13(d), in part, to provide shareholders with material information regarding potential changes in control in a timely manner to facilitate their investment decisions.[155] Because changes in technology and developments in the financial markets since 1968 have facilitated investors' abilities to rapidly accumulate beneficial ownership,[156] we believe it is appropriate to shorten the initial Schedule

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151 *See infra* Section IV.C.1.a.ii.

152 *See supra* note 92 and accompanying text.

153 *See, e.g.*, Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 136 (1967) (statement of Stanley Kaplan, Professor, University of Chicago) (stating that "[r]equiring the filing . . . within seven days after acquisition of 10% of equity securities seems to provide an unduly short time for preparation of a document of that magnitude and significance" and noting that "[i]t will take longer to prepare and check such a document properly").

154 *See supra* notes 138-139 and accompanying text.

155 *See* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. On Securities of the S. Comm. On Banking and Currency, 90th Cong. 25 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) ("We think that this bill would improve our ability to elicit . . . information [regarding changes of control] . . . in a timely way, that is necessary for appropriate investor information and judgment."); *see also id.* at 70 (statement of Donald J. Calvin, Vice President, New York Stock Exchange) (noting that Senator Harrison A. Williams, Jr. stated that "[t]he primary objective of this bill . . . is to provide full and timely disclosure to stockholders" and stating that "[d]isclosure to stockholders of events which may affect investment decisions is and has been for many years a primary object of exchange policy" and that "[w]e consider timely disclosure . . . vital to the fair operation of a securities market").

156 *See supra* note 140 and accompanying text.

13D deadline so that the rate at which shareholders become aware of such accumulations keeps pace.[157]

Many commenters also expressed concern that shortening the initial Schedule 13D filing deadline could, among other things, disincentivize shareholder activism by reducing the amount of time such shareholders have to accumulate positions in an issuer's covered class before filing a Schedule 13D.[158] According to those commenters, this reduction of time could deprive issuers and their shareholders of the positive benefits of such activism, thereby increasing management entrenchment and reducing shareholder engagement and corporate accountability.[159]

Although we primarily are concerned with ensuring that investors receive material information in a timely manner, we agree that we should remain conscious of the competing interest that undue burdens not be imposed on shareholders engaging in change of control

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157 We recognize that several commenters disagreed that technological advancements and other developments in the financial markets justify shortening the initial Schedule 13D deadline as proposed. *See supra* notes 91-95 and accompanying text. For example, some commenters noted that despite advances in technology, the filing process still has numerous operational components that take time to complete. *See* letter from IAA; *see also* letter from STB (stating that "calculation of beneficial ownership remains an extremely manual process, can involve significant judgment and relies on third party information"). Others described some ways in which it may be more difficult to accumulate a significant equity stake in today's financial markets. *See infra* notes 678-679 and accompanying text. As an initial matter, we expect that the change from the proposed five-calendar day deadline to a five-business day deadline should mitigate these concerns. *See infra* note 165 and accompanying text. In addition, for the reasons discussed *infra* notes 166-168 and accompanying text, we believe that our analyses of the current timing of Schedule 13D filings and accumulations of significant equity stakes demonstrate that Schedule 13D filers are capable, utilizing modern technology and in light of the characteristics of today's financial markets, of complying with the amended five-business day deadline. This is especially so given the sophistication and size of many Schedule 13D filers. *See supra* note 58 and accompanying text. Finally, some commenters expressed concerns about filers' ability to meet the proposed deadline (as well as the other Schedule 13D and 13G filing deadlines) given the amount of time it may take to obtain EDGAR filer codes. *See, e.g.*, letters from MSBA; STB. To ensure they obtain their EDGAR filer codes in a timely manner, we generally expect filers to begin the process of applying for their EDGAR filer codes before they have incurred a filing obligation (*e.g.*, as they begin to acquire shares with a control intent but before crossing the 5% threshold). Filers should note that the Commission's staff reviews all Form ID applications, and filers should allow sufficient time for that review. Further, the Commission's staff works diligently to process Form IDs promptly upon receipt of an application.

158 *See supra* notes 77-83 and accompanying text.

159 *See supra* notes 77-83, 103 and accompanying text.

transactions.[160] In the Proposing Release, the Commission "recognize[d] the chilling effect that a shortening of the initial Schedule 13D filing deadline could have on a shareholder's ability . . . to effect changes at companies" if the shortened deadline increases the costs and reduces the incentives for shareholders attempting to effect a change of control.[161] Yet, the Commission further stated that it did not believe "that a shortening of the deadline would unduly disrupt that balance," noting that "many Schedule 13D filers currently do not avail themselves of the full 10-day filing period."[162] A number of commenters similarly asserted that the proposed five-day deadline would not significantly impede shareholder activism or impose significant costs or burdens on beneficial owners of more than five percent of a covered class.[163]

Notwithstanding this support for the proposed five-calendar day deadline, we have decided to instead adopt a five-business day deadline. This change from the proposal comports with a recommendation that a number of commenters, including several that opposed the

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160 *See* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 1 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) ("It must be emphasized again that in establishing requirements which will make this important information available to stockholders, we must be careful not to tip the scales to favor either incumbent management or those who would seek to oust them. We believe that the provisions of the present bill . . . reflect an appropriate balance among competing interests which, at the same time, will fulfill the need of public stockholders to be fully informed about the control and potential control of the company in which they have invested."); H.R. Rep. No. 1711, at 4 (1968) ("The bill avoids tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid. It is designed to require full and fair disclosure for the benefit of investors while at the same time providing the offeror and management equal opportunity to fairly present their case."); 113 CONG. REC. 24, 664 (1967) (noting that "takeover bids should not be discouraged, since they often serve a useful purpose by providing a check on entrenched but inefficient management") (statement of Sen. Harrison A. Williams, Jr.).

161 Proposing Release at 13851. The Commission noted academic research indicating that large blockholders may improve the share price and the corporate governance of the companies in which they invest and that all of a company's shareholders enjoy these benefits. Proposing Release at 13851, n.30. The Commission further recognized that shortening the initial Schedule 13D filing deadline could reduce the profitability of such investments, making large blockholders less inclined to make those investments or engage with the companies in ways that produce such benefits. *Id.* This is consistent with the concerns that many opposing commenters expressed. *See supra* notes 77-83 and accompanying text; *see also infra* Section IV.C.1.b.i.

162 *Id*.

163 *See supra* notes 57-65 and accompanying text.

proposed amendments, made to the Commission.[164] Further, this shift to a "business days"-based deadline also will help to address a variety of concerns that commenters expressed about the burdens associated with the proposed five-day deadline. Specifically, five business days (as compared to five calendar days) gives beneficial owners additional time to accumulate positions in an issuer before filing a Schedule 13D and to prepare and file an accurate Schedule 13D.[165] As with the proposed five-calendar day deadline, we also note that many Schedule 13D filings currently are made within the amended five-business day deadline.[166] This demonstrates that at least some Schedule 13D filers are likely to be unaffected by the shortened deadline. And, many Schedule 13D filers are sophisticated, large investors that have access to technology and resources that should allow them to prepare and file a Schedule 13D within five business days.[167] As such, we do not anticipate a five-business day deadline will be unduly disruptive for Schedule 13D filers.

With respect to shareholder activism in particular, we note that for the vast majority of

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164 *See supra* notes 125, 130 and accompanying text.

165 The five-business day deadline, as compared to the proposed five-calendar day deadline, generally will give beneficial owners additional time before their Schedule 13D filing is due if the filing period encompasses days that are not business days (*i.e.*, Saturday, Sunday, or a Federal holiday). As an illustrative example, if a person acquires beneficial ownership of more than 5% of a covered class on a Wednesday, then under the five-business day deadline, the initial Schedule 13D is not due until the following Wednesday (assuming there are no Federal holidays during that period), giving the filer a total of seven days to prepare and submit the Schedule 13D. However, under the proposed five-day deadline, if a person acquires beneficial ownership of more than 5% of a covered class on a Wednesday, then the initial Schedule 13D will be due on the following Monday (assuming that Monday is not a Federal holiday), giving the filer a total of five days to prepare and submit the Schedule 13D. For purposes of performing this comparison of the five-business day deadline to the proposed five-day deadline, it is important to keep in mind that if the last day of a filing deadline expressed in "days" falls on a Saturday, Sunday, or Federal holiday, then such filing may be made on the next business day thereafter. 17 CFR 240.0-3 ("[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following.").

166 *See infra* Section IV.B.3.a.i ("Approximately 29 percent of the initial Schedule 13D filings [in 2022], representing about 41 percent of all of the initial Schedule 13D filings that were filed by the current filing deadline, were filed within the amended five-business day deadline.").

167 *See supra* note 58 and accompanying text.

campaigns, the shareholder currently accumulates at least 90 percent of its equity stake, with many accumulating 100 percent of their equity stake, within the amended five-business day deadline.[168] This demonstrates that most shareholder activists may not be affected by the shortened deadline. In addition, for those campaigns that would be affected by the amended five-business day deadline, we expect the activists will adapt to the shortened deadline and continue to pursue the campaigns.[169] For example, for those campaigns in which the shareholder has accumulated less than 90 percent of its equity stake within the amended five-business day deadline, we note that the unrealized gains attributable to the shares accumulated after the amended deadline generally represent a significantly smaller portion of the shareholder's total unrealized gains (when compared to the shares accumulated prior to the amended deadline).[170]

Finally, we note that profits from shareholder activism may not be derived solely from the increase in share price associated with the public disclosure of an activist's more than five percent beneficial ownership stake. Specifically, shareholder activists may continue to experience abnormal positive returns from activism even after filing their initial Schedule 13D. Thus, to the extent a shareholder activist seeks to profit from increases in share price after the

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168 *See infra* Section IV.C.1.b.i, Table 6 (noting that for approximately 208 of the 215 campaigns conducted annually, at least 90% of the equity stake is accumulated within the amended five-business day deadline); *see also* letter from Better Markets II (citing the same analysis conducted in the DERA Memorandum for the proposed five-day deadline and stating that the analysis "indicate[s] that shortening the deadline should not significantly impede activist campaigns").

169 *See infra* note 847 and accompanying text.

170 *See infra* Section IV.C.1.b.i, Table 6 (noting that for the 7 campaigns conducted annually for which less than 90% of the total equity stake was accumulated by the amended five-business day deadline, and the 1 campaign conducted annually for which less than 75% of the total equity stake was accumulated by the amended five-business day deadline, the average percentages of the filer's unrealized gains on reported equity stake, as of the day after filing date, attributable to shares accumulated after amended deadline were 9.1% and 22.6%, respectively); *see also* letter from Better Markets II (citing the same analysis conducted in the DERA Memorandum for the proposed five-day deadline and stating that "for filers who acquired less than 100% of their reported stake by the proposed deadline, only 6.8% of their unrealized gains on average were attributable to shares accumulated after the proposed deadline").

public disclosure of its more than five percent beneficial ownership stake, we would not expect a reduction in the profits associated with such disclosure to be determinative as to whether a shareholder engages in an activist campaign.

The amended five-business day deadline reflects our attempt to ensure investors receive material information in a timely manner while, at the same time, maintaining the appropriate balance between issuers of securities and the shareholders who seek to exert influence or control over issuers, especially when compared with the proposed five-calendar day deadline, which many commenters supported,[171] and the even shorter deadlines many commenters recommended.[172] We believe a five-business day deadline is sufficiently prompt and represents a more modern approach that reflects the technological advancements and other developments in the financial markets in the more than 50 years since the 10-day deadline was enacted. A five-business day deadline, as compared to the current 10-day deadline, also would more closely align the initial Schedule 13D filing deadline with the reporting deadline on Form 8-K for issuers (generally, four business days) and Form 4 for officers, directors, and beneficial owners of more than 10 percent of a covered class (two business days), both in terms of the length of the deadline and the use of "business days," rather than "days," to express the deadline.[173] This alignment

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171 *See supra* note 37 and accompanying text.

172 *See, e.g.*, letters from C. McEntee (recommending a same-day initial Schedule 13D filing deadline); D. Choate (same); Corey (same); Prof. Steinberg (recommending, among other things, a one-day initial Schedule 13D filing deadline); J. Dunlop (recommending a one-day initial Schedule 13D filing deadline); J. Kennedy (same); Juan B. (same); Phillip (same); WLRK I (recommending, among other things, a one-business day initial Schedule 13D filing deadline); C. Jacobs (recommending a two-day initial Schedule 13D filing deadline); NIRI (recommending a two-business day initial Schedule 13D filing deadline); PL Salvati (same); SCG (same); SCG & NIRI (same); T. Reilly (recommending a three-day initial Schedule 13D filing deadline).

173 *See supra* note 150; *see also* letter from STB (noting that most analogous securities laws governing reporting of material changes (*e.g.*, Form 8-K and Section 16 filings) require filings within time periods designated in business days rather than calendar days). We further believe it is advisable to express all

should help to ensure that investors consistently receive prompt disclosures of material information, irrespective of the source. A five-business day deadline for the initial Schedule 13D also is more consistent in both length and form with the filing deadlines for similar beneficial ownership reports in foreign jurisdictions.[174]

Overall, because we expect that the vast majority of activist campaigns, and the value they create, will continue unabated under the amended rules,[175] we conclude that the significant benefits of the amendments outlined here and below[176] justify their costs.

Some commenters expressed other objections to the proposed amendments. For example, several commenters disagreed with the information asymmetry-based concerns in the Proposing Release as a basis for the proposed amendments.[177] We recognize that there are information

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Schedule 13D filing deadlines (*i.e.*, for both initial filings and amendments) in "business days." We expect that the consistent use of "business days"—as opposed to using "days" or inconsistently using both "days" and "business days" to express the filing deadlines—will ease Schedule 13D filers' administrative burdens. We also anticipate that this uniform approach across the filing deadlines will make it easier for Schedule 13D filers to comply with those deadlines. In addition, as amended, all of the Schedule 13G deadlines that are less than 45 days also will be expressed in "business days," consistent with one commenter's recommendation. *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

174 For example, Australia requires disclosure of any position of 5% or more within two business days if any transaction affects or is likely to affect control or potential control of the issuer. *See* Corporations Act 2001 (Cth) sec. 671B (Austl.). The United Kingdom imposes a two-trading-day deadline for disclosure of acquisitions in excess of 3% of an issuer's securities. *See* Disclosure Rules and Transparency Rules, Ch. 5 (U.K.). Germany requires a report "immediately," but in no event later than four days after crossing the acquisition threshold. *See* Securities Trading Act, Sept. 9, 1998, BGBL. I at 2708, as amended, pt. 5 (Ger.). Hong Kong securities laws require a report within three business days of the acquisition of a "notifiable interest" under the law. *See* Part XV of the Securities and Futures Ordinance (promulgated by the Securities and Futures Commission, effective Apr. 1, 2003) (H.K.). We note that commenters disagreed as to the utility of referencing foreign jurisdictions' beneficial ownership reporting deadlines for purposes of determining the appropriate initial Schedule 13D filing deadline. *See supra* note 55 and accompanying text. Nonetheless, we believe that this comparative analysis suggests that a shortened deadline is workable based on the experiences of these foreign jurisdictions.

175 *See infra* Section IV.C.1.b.

176 *See infra* Section IV.C.a.

177 *See supra* notes 84-90 and accompanying text.

asymmetries involved in any market transaction and agree that not all information asymmetries warrant a regulatory response. For example, one commenter stated that the information asymmetries described in the Proposing Release "are simply the beneficial result of research and initiative by investors and the sign of properly functioning markets" and expressed concern that "[i]f activists have no economic incentive to pursue activism, other shareholders will not experience the increase in value that would have otherwise resulted from the activist's conduct."[178] We acknowledge that benefits may stem from the information asymmetry between a Schedule 13D filer and the market, and we recognize that the informational advantage of Schedule 13D filers results, in general, from their own expenditures on research and analysis or from their efforts and expenditures to pursue changes at the issuers in which they accumulate these shareholdings.[179] As such, although the Proposing Release referred to information asymmetries between Schedule 13D filers and selling shareholders and expressed concern that those information asymmetries "could harm investors,"[180] we do not focus on the reduction of these asymmetries as a justification for shortening the initial Schedule 13D deadline, as

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178 *See* letter from EIM I. Further, that commenter contrasted the proposal with the Short Position Reporting Proposal and stated that "[t]he Commission does not explain why the research and analysis of a short seller is entitled to protection and does not constitute material non-public information about the company it is shorting, while the research and analysis of an activist is somehow characterized differently." *Id*.; *see also supra* note 84. The commenter's comparison of our shortening of the initial Schedule 13D deadline to the Short Position Reporting Proposal is inapt. We are shortening the Schedule 13D deadline in order to ensure that investors receive material information regarding potential changes in control in a timely manner to facilitate their investment decisions. This is consistent with the purpose of Section 13(d), and necessarily requires public disclosure, including of the Schedule 13D filer's identity. *See supra* note 155 and accompanying text; Exchange Act Section 13(d)(1)(A) (requiring a Schedule 13D filer to disclose, among other things, its "background and identity"). The Short Position Reporting Proposal addresses a different regulatory scheme, and the reasons for those proposed amendments are discussed in that release. *See* Short Position Reporting Proposal. In addition, contrary to the commenter's suggestion that the Commission is disregarding the value of an activist's research and analysis, the amended five-business day deadline represents our attempt to maintain an appropriate balance between the requirement that material information be timely disseminated to investors and the competing interest that undue burdens not be imposed in the change of control context.

179 *See infra* Sections IV.C.1.a.iii and iv.

180 *See* Proposing Release at 13850 & n.19, 13881 & n.214.

discussed in Sections IV.C.1.a.iii and iv below.

Some other information asymmetries may, however, raise concerns that warrant a regulatory response. Specifically, the research and analysis prepared by the staff of the Division of Economic and Risk Analysis indicate that shortening the initial Schedule 13D deadline to five business days could meaningfully reduce information asymmetries between "informed bystanders"[181] and other, less-informed investors who sell their shares during the period after which an initial Schedule 13D filing obligation has been incurred but before the filing is made.[182] The informational advantage those "informed bystanders" have over the selling shareholders in these transactions and the associated wealth transfers may be perceived by some market participants to be unfair. Thus, to the extent that a shortened initial Schedule 13D filing deadline would reduce these wealth transfers, thereby addressing this perceived unfairness, this change could enhance trust in the securities markets and promote capital formation.[183]

We also note that some commenters questioned the appropriateness and legality of the proposed amendments in light of certain U.S. Supreme Court cases that the commenters cited for the proposition that the "sole purpose" of the Williams Act is to protect shareholders confronted with a cash tender offer.[184] In both cases, the Court made the cited statements in the limited context of determining causes of action or remedies that are available for purported violations of certain provisions of the Williams Act. Neither decision suggests that the provisions and protections of the Williams Act are available only when a cash tender offer is involved; in fact,

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181 *See infra* note 753 and accompanying text for a discussion of the term "informed bystanders," as used in this release.

182 *See infra* Section IV.C.1.a.iii.

183 *See id*.

184 *See supra* notes 90, 96 and accompanying text (describing comment letters citing *Piper et al. v. Chris-Craft Industries, Inc.* 430 U.S. 1 (1977) and *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49 (1975)).

the Court in *Rondeau v. Mosinee Paper Corp.* referred to the defendant-shareholder's belated compliance with Section 13(d), notwithstanding the absence of a pending or threatened cash tender offer.[185] We also note statements in the legislative history indicating that Congress intended that the Williams Act would apply to any "acqui[sition] of a substantial block of equity securities . . . by a cash tender offer . . . *or through open market or privately negotiated purchases*."[186] We do not believe, therefore, that our shortening of the initial Schedule 13D deadline must be tied to risks shareholders face in connection with cash tender offers.

Finally, some opposing commenters expressed other doubts regarding the Commission's authority to shorten the initial Schedule 13D deadline as proposed[187] and asserted that the Commission did not identify a market event or failure that would justify the proposed amendments.[188] As noted above, however, Section 13(d)(1) of the Exchange Act clearly grants the Commission authority to shorten the initial Schedule 13D filing deadline.[189] In addition, the Commission has long recognized that acquisitions made after a person acquires beneficial ownership of more than five percent of a covered class but before the person files an initial Schedule 13D constitute a "disclosure gap [that] may deprive security holders of a fair

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185 442 U.S. at 59 (noting, in relevant part, that the shareholder "has now filed a proper Schedule 13D, and there has been no suggestion that he will fail to comply with the Act's requirement of reporting any material changes in the information contained therein" notwithstanding the fact that the shareholder "has not attempted to obtain control of respondent, either by a cash tender offer or any other device").

186 S. Rep. No. 90-550 to Accompany S. 510, (Aug. 29, 1967); *see also* Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bids: Hearing on S. 510 Before the Subcomm. on Securities of the S. Comm. on Banking and Currency, 90th Cong. 16 (1967) (statement of Manuel F. Cohen, Chairman, Securities and Exchange Commission) (stating that "[t]he bill before you deals with stock acquisitions in three specific contexts" including "the acquisition by means of a cash tender offer" and "other acquisitions by any person or group").

187 *See supra* note 96 and accompanying text.

188 *See supra* notes 106, 109 and accompanying text.

189 15 U.S.C. 78m(d)(1) (requiring a Schedule 13D to be filed "within ten days . . . or within such shorter time as the Commission may establish by rule").

opportunity to adjust their evaluation of the securities of a company with respect to [a] potential change in control."[190] We believe that the current length of that disclosure gap, together with the information asymmetry[191] that it may facilitate and the advancements in technology and developments in the financial markets since Congress enacted the Williams Act, provide grounds to shorten the initial Schedule 13D filing deadline from 10 days to five business days.

2. Rules 13d-1(b), (c), and (d)

Congress enacted Section 13(g) in 1977[192] to address the absence of beneficial ownership reporting by persons who had accumulated large amounts of stock in a public issuer but were not required to file a beneficial ownership report under Section 13(d).[193] Section 13(g) was intended to "supplement the current statutory scheme by providing legislative authority for certain additional disclosure requirements that in some cases could not be imposed administratively."[194] Beneficial owners who currently report on Schedule 13G pursuant to Section 13(g) and corresponding Rule 13d-1(d) are not subject to Section 13(d) because they either made an exempt acquisition or an acquisition otherwise not covered by the statute. Section 13(d), in

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190 Report of the Securities and Exchange Commission on Beneficial Ownership Reporting Requirements pursuant to Section 13(h) of the Securities Exchange Act of 1934 (June 27, 1980). Following a review of the effectiveness of Section 13(d) conducted more than four decades ago, the Commission evaluated the then "increasingly prevalent practice of [large blockholders] acquiring additional securities of [a covered] class during the 10-day period after the acquisition which results in the beneficial ownership of more than 5 percent and before the disclosure statement is required to be, and normally is, filed . . . ." Securities and Exchange Commission Report on Tender Offer Laws, printed for the Use of the S. Comm. on Banking, Housing and Urban Affairs (Comm. Print 1980). The Commission provided multiple illustrative examples in which "the existing notification system often does not provide shareholders with relevant information in a timely manner." *Id.*

191 *See supra* notes 181-183 and accompanying text.

192 Domestic and Foreign Investment Improved Disclosure Act of 1977, Pub. L. 95-214, sec. 203, 91. Stat. 1494.

193 S. Rep. No. 114, at 13 (1977).

194 S. Rep. No. 95-114, at 13 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4098, 4111.

contrast to Section 13(g), applies only to beneficial owners who make non-exempt acquisitions of more than five percent of a covered class. Section 13(g) was intended to close this gap.

In response to the enactment of Section 13(g), the Commission adopted Schedule 13G to serve two purposes: (1) provide an optional short form disclosure statement for certain persons subject to Section 13(d); and (2) provide a mandatory disclosure statement for persons subject to Section 13(g).[195] Together with Section 13(d), Section 13(g) was intended to provide a "comprehensive disclosure system of corporate ownership" applicable to all persons who are the beneficial owners of more than five percent of a covered class.[196] Rules 13d-1(b), (c), and (d) provide the filing deadlines for the initial Schedule 13G. Which deadline a person is subject to for its initial Schedule 13G filing depends on whether the person is a QII, Exempt Investor, or Passive Investor.

A QII relying upon Rule 13d-1(b) currently is obligated under Rule 13d-1(b)(2) to file a Schedule 13G "within 45 days after the end of the calendar year in which the person became obligated" to report beneficial ownership, but only if such QII beneficially owns more than five percent of a covered class at the end of a calendar year.[197] If the QII beneficially owns more than

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195 *Filing and Disclosure Requirements Relating to Beneficial Ownership*, Release No. 34-14692 (Apr. 21, 1978) [43 FR 18484 (Apr. 28, 1978)] ("Filing and Disclosure Release").

196 *Id*. at 18486; *see also* S. Rep. No. 114, at 14 (1977).

197 First adopted as Rule 13d-5 in 1977 and subsequently redesignated as Rule 13d-1(b)(1) in 1978, the predecessor to current Rule 13d-1(b)(2) established that an institution eligible to report on Schedule 13G had until 45 days after the end of the calendar year to report beneficial ownership to the extent the percentage beneficially owned exceeded 5% as of the end of the calendar year. *See* Filing and Disclosure Release at 18486 (explaining that "the first proviso in new Rule 13d-1(b) has been added to make clear that the obligation to file a Schedule 13G . . . need be determined only on the last day of the calendar year" and that "filing [a] Schedule 13G to disclose a beneficial ownership interest of more than five but not more than ten percent will be required forty-five days after the end of the calendar year"); *see also Adoption of Beneficial Ownership Disclosure Requirements*, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)] (describing the Commission's adoption of new Rule 13d-5 and related new Form 13D-5, which permitted brokers, dealers, banks, investment companies, investment advisers, and employee benefit plans to utilize an abbreviated disclosure notice).

10 percent of a covered class as of the last day of any month, then the initial Schedule 13G must be filed within 10 days after the end of that month. A QII relying on Rule 13d-1(b), therefore, may have beneficial ownership in excess of five percent throughout the calendar year without incurring a filing obligation unless the QII beneficially owns more than 10 percent of a covered class at the end of any month during that year.

Rule 13d-1(d),[198] as with Rule 13d-1(b), imposes an initial Schedule 13G filing deadline of 45 days after the end of the calendar year, but only for investors who have become beneficial owners without having made an acquisition recognized under Section 13(d)(1). Given that these investors did not make the requisite acquisition that would have subjected them to Section 13(d), the Commission has previously referred to this type of beneficial owner as an "Exempt Investor." Unlike the QIIs and Passive Investors—discussed below, in the context of Rule 13d-1(c)—who file a Schedule 13G in lieu of Schedule 13D and at all times remain subject to Section 13(d), Exempt Investors are subject to Section 13(g) at the time their initial filing obligation arises. Exempt Investors reporting pursuant to Rule 13d-1(d) today may include persons such as founders of companies and early investors in an issuer's class of equity securities who made their acquisition before the class was registered under Section 12 of the Exchange Act.[199] These beneficial owners may continue to influence or control the issuer. Accordingly, the Commission

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198 17 CFR 240.13d-1(d).

199 The Commission has explained that certain "persons who are not required to file under Rule 13d-1(a) . . . would be required to file a Schedule 13G pursuant to the amendments herein proposed." Filing and Disclosure Release at 18502. Such persons may include "persons who acquired not more than two percent of a class of securities within a twelve month period, who are exempt from Rule 13d-1(a) by Section 13(d)(6)(B)." *Id.* The Commission also stated that "Regulation 13D-G . . . would require any person 'otherwise' not required to report pursuant to Section 13(d), but who is a beneficial owner of more than five percent of a specified class of equity securities to report on Schedule 13G." *Id.*

has emphasized that the disclosures required under Section 13(g) are obtained in connection with the overall regulatory purposes served by Section 13(d).[200]

Finally, a beneficial owner electing to report on Schedule 13G in lieu of Schedule 13D in reliance on Rule 13d-1(c) as a Passive Investor must file a Schedule 13G within 10 days after acquiring beneficial ownership of more than five percent of a covered class. A person is eligible to file as a Passive Investor only if such person is not seeking to acquire or influence control of an issuer and beneficially owns less than 20 percent of a covered class. Persons unable or unwilling to certify under Item 10 of Schedule 13G that they do not have a disqualifying purpose or effect because, for example, the possibility exists that they may seek to exercise or influence control, are ineligible to file a Schedule 13G and must instead file a Schedule 13D.

a. Proposed Amendments

The Commission proposed to amend Rules 13d-1(b) and (d) to shorten the filing deadline for the initial Schedule 13G to be filed by QIIs and Exempt Investors to five business days after the end of the month in which beneficial ownership exceeds five percent of a covered class. The Commission expected that the proposed acceleration of these deadlines would result in more timely disclosures while minimizing any potential additional burdens.[201] The Commission also believed that these investors should already have well-established compliance systems in place to

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200 Filing and Disclosure Release at 18486 (stating that "the enactment of [S]ection 13(g) has rendered moot the issue of whether obtaining" disclosure from institutional investors in the ordinary course of their business and without any control intent "under [S]ection 13(d)(5) is within the primary purpose of [S]ection 13(d)"). The Commission also emphasized "the importance of disclosing to the public the location of rapidly accumulated blocks of stock, even though they have been acquired not with the purpose or with the effect of changing or influencing control" as a predicate for its position. *Id.*

201 Proposing Release at 13856.

monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered.[202]

Given the proposal to shorten the initial reporting deadline to five business days after the end of the month, the Commission also recognized that the current provision of Rule 13d-1(b)(2) that operates to accelerate that initial filing deadline if beneficial ownership exceeds 10 percent at the end of any month would be unnecessary in light of Rule 13d-2(c)'s overlapping Schedule 13G amendment requirement.[203] Accordingly, the Commission proposed to further amend Rule 13d-1(b)(2) to delete the language that imposes an initial reporting obligation on QIIs after exceeding 10 percent of a covered class.

The Commission also proposed to amend the filing deadline in Rule 13d-1(c) to five days after the date the person becomes obligated to file an initial Schedule 13G. The Commission believed that it would be appropriate to amend the initial Schedule 13G filing deadline in Rule 13d-1(c) to match the proposed initial Schedule 13D filing deadline in Rule 13d-1(a) in order to maintain the historical consistency between the deadlines in Rules 13d-1(c) and (a) and to facilitate the overall goal of increasing transparency in beneficial ownership.[204]

In proposing these amendments, the Commission stated that the current initial Schedule 13G filing deadlines' length and manner of applicability to QIIs and Exempt Investors together could, in certain circumstances, frustrate the purposes of Sections 13(d) and 13(g).[205] For example, the Commission noted investors reporting pursuant to current Rules 13d-1(b) and (d) may avoid beneficial ownership reporting by selling down their positions before the end of the

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202 *Id*.

203 *Id*.

204 *Id*.

205 *Id*. at 13855.

calendar year, and, in the case of QIIs, selling down before the end of a month if ownership exceeds 10 percent.[206] The proposed amendments to the filing deadlines for initial Schedule 13G filings by QIIs and Exempt Investors, therefore, were intended to improve transparency and avoid any gaps in reporting.[207]

In addition, the Commission noted that when Rule 13d-1(c) was adopted in 1998, Passive Investors may not have had reasonable access to advanced technologies to make more immediate filings possible.[208] Consistent with its justification for proposing to shorten the initial Schedule 13D filing deadline under Rule 13d-1(a), the Commission asserted that Passive Investors today not only have gained valuable experience complying with these reporting provisions, but also have ready access to the necessary filing technology.[209] As such, the Commission proposed amending Rule 13d-1(c) in light of those technological advancements and its proposed amendment to the analogous filing deadline in Rule 13d-1(a).

b. Comments Received

Commenters submitted a variety of views on the proposed amendments to Rules 13d-1(b), (c), and (d). Several commenters supported the proposed amendments.[210] Some of those commenters supported accelerating the initial Schedule 13G filing deadlines for many of the

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206 *Id*.

207 *Id*. at 13855-56.

208 *Id*. at 13856.

209 *Id.*

210 *See, e.g.*, letters from AFL-CIO (supporting only the proposed amendment to Rule 13d-1(c)); AFREF (same); AFREF, et al. (same); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; C. Robinson; John F. Phinney Jr, CEO & Founder, Convergence Inc. (June 15, 2023) ("Convergence") (supporting only the proposed amendment to Rule 13d-1(b)); EEI; Engineer; FedEx; Freeport-McMoRan; Andrew Patrick White, Founder CEO of FundApps (Feb. 28, 2022) ("FundApps") (same); HMA I; J. Pieper; J. Soucie; Jonah; Juan; Mark C.; Mike; Nasdaq; P. Worts; T. Mirvis, et al.; Todd.

same reasons they supported accelerating the initial Schedule 13D filing deadline.[211] Another commenter asserted that the proposed amendments would benefit shareholders and other market participants by facilitating sound corporate governance.[212]

Several commenters supported the proposed amendments based on changes in technology and developments in the financial markets.[213] A number of commenters noted that some foreign jurisdictions require beneficial ownership reporting on a shorter deadline than currently required under Regulation 13D-G.[214] One commenter viewed the current Schedule 13G filing deadlines as outdated.[215] Other commenters asserted that the proposed amendments would not impose significant costs to beneficial owners of more than five percent of a covered class.[216] And, another commenter stated that the proposed amendments would be consistent in balancing the need for adequate disclosures with burdens placed on filers to accurately prepare required disclosures.[217]

Several commenters opposed the proposed amendments.[218] Some of those commenters disagreed with the Commission's technological advancement-based justifications for the

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211 *See supra* notes 38-40, 43-44 and accompanying text.

212 *See* letter from AFREF. For example, the commenter asserted that a shortened filing deadline would help investors ensure their asset managers are fulfilling their fiduciary duties and help inform the education and advocacy efforts of those with a stake in proxy contests, shareholder resolutions, and other important votes. *Id*.

213 *See, e.g.*, letters from AFL-CIO; C. Robinson; FedEx; Freeport-McMoRan; T. Mirvis, et al.

214 *See, e.g.*, letters from AFREF; Convergence; FundApps.

215 *See* letter from T. Mirvis, et al.

216 *See, e.g.*, letters from Anonymous 11; Freeport-McMoRan; J. Soucie.

217 *See* letter from FedEx.

218 *See, e.g.*, letters from A. Day; ABA; AIMA; B. Mason; Dodge & Cox; E. Fraser (opposing only the proposed amendment to Rule 13d-1(c)); IAA (opposing only the proposed amendments to Rules 13d-1(b) and (d)); ICI I; MFA (same); MSBA (supporting only the proposed amendments to Rules 13d-1(c) and (d)); Perkins Coie; Kenneth E. Bentsen, Jr, CEO and President, Securities Industry and Financial Markets

proposed acceleration of the beneficial ownership reporting deadlines.[219] For example, one commenter asserted that the Commission has never suggested that technological ability to file is or should be the primary basis to determine the appropriate filing deadlines for Schedules 13D and 13G.[220] Another commenter stated that electronic filing of a Schedule 13G can take longer than physical mailing because of the time and effort required to obtain EDGAR filing codes as compared to simply making an overnight mailing or hand delivery of a paper filing.[221] Another commenter questioned why the existence of new filing technologies justify subjecting QIIs to Schedule 13G filing requirements so much shorter than the ones currently in place.[222]

Some opposing commenters acknowledged the technological advances identified in the Proposing Release but disagreed that they justify the proposed amendments. For example, one commenter stated that technological advances do not support significantly reducing filing deadlines as proposed because, despite advances in technology, the filing process still has

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Association (Apr. 11, 2022) ("SIFMA") (opposing only the proposed amendments to Rules 13d-1(b) and (c)); Kyle Brandon, Managing Director, Head of Derivatives Policy, SIFMA (June 27, 2023) ("SIFMA & SIFMA AMG") (same); State Street Corporation (Apr. 11, 2022) ("SSC") (opposing only the proposed amendment to Rule 13d-1(b)); STB; TIAA (opposing only the proposed amendment to Rule 13d-1(b)); TRP.

219 *See, e.g.*, letters from ABA; Dodge & Cox; IAA; ICI I; MSBA; STB; TIAA.

220 *See* letter from ICI I. The commenter also stated that the Commission has not made significant technological advances over the years to its own systems that market participants rely on to prepare Schedules 13D and 13G, making it challenging and costly for investors to gather the information about beneficial ownership they need to file Schedules 13D and 13G. *Id.*

221 *See* letter from MSBA. The commenter also noted that Passive and Exempt Investors generally do not have specialized technology that would make it practical for them to file a Schedule 13G on the proposed accelerated bases.

222 *See* letter from TIAA. The commenter also asserted that the Proposing Release did not provide data showing that QIIs have as a standard matter adopted the type of technological improvements that would make it easier for them to prepare these filings on such a short timeline. *Id*.

numerous operational components that take time to complete.[223] Similarly, some commenters stated that notwithstanding any technological advancements, a month-end-based reporting deadline for Schedule 13G would be difficult to meet because much of the process is still manual and cannot be done reliably via any current technology, including exercising the judgment required to determine whether a person is a beneficial owner under the various provisions of Rule 13d-3.[224] Another commenter stated that, despite technological advancements, it is often difficult for QIIs to gather aggregate information quickly, confirm such information for accuracy, draft disclosure documents and receive approval for filing purposes, especially given that QIIs often beneficially own positions in many issuers and those positions change frequently.[225]

Opposing commenters also criticized some of the Commission's other justifications for, or the purported benefits of, the proposed amendments. For example, some commenters stated that the Commission has not provided evidence to support its concerns regarding reporting gaps and information asymmetries that would warrant the proposed acceleration of the reporting deadlines.[226] Others asserted that the Commission has not articulated how the proposed

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223 *See* letter from IAA (noting that "an investment advisory firm's reporting process could involve receiving spreadsheets from multiple affiliates, consolidating those spreadsheets into one report, reviewing the consolidated report for errors and discrepancies, following up to correct issues, calculating beneficial ownership, preparing Schedule 13D or 13G" and may also require them to obtain "review by outside counsel . . . [and] signatures (including from group members if needed)").

224 *See* letters from STB; TIAA. For example, one of these commenters noted that notwithstanding any technological advancements, a month-end-based reporting deadline for Schedule 13G would be difficult to meet because analysis of Rule 13d-3 beneficial ownership depends on the most recently published outstanding share number from an issuer and, therefore, an investor cannot reliably determine whether it is a 5% beneficial owner of any particular stock as of a month-end reference date until the last day of such month and there is no consistent monthly disclosure requirement for an issuer's outstanding shares. *See* letter from STB.

225 *See* letter from ABA.

226 *See, e.g.*, letters from ICI I; SIFMA; TIAA. Those commenters also asserted that the Commission's unsubstantiated concerns about QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing does not provide an appropriate basis for the proposed amendment to Rule 13d-1(b). *Id*.

amendments will promote transparency into matters of corporate control and questioned the necessity of the proposed amendments in that respect.[227] Some of those commenters expressed the view that the Commission's existing rules provide sufficient transparency into matters of corporate control with respect to QIIs and Passive Investors,[228] as well as Exempt Investors.[229]

In addition, one commenter asserted that the Commission has not persuasively explained why it is appropriate to accelerate the beneficial ownership reporting deadlines as proposed.[230] Some commenters stated that the information filed on Schedule 13G by Passive and Exempt Investors is unlikely to be material information that is market-moving.[231] Other commenters asserted that the proposed amendments would provide little benefit to the market given that institutional investment managers' trading activity is already subject to significant scrutiny by the Commission and the public through the filing of Form 13F.[232]

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227 *See* letters from ABA; SIFMA; STB.

228 *See* letters from ABA; STB. For example, those commenters noted that QIIs and Passive Investors already are obligated to amend their Schedule 13G promptly upon crossing a 10% beneficial ownership threshold and are obligated to file an initial Schedule 13D if their control intent changes. *Id*.

229 *See* letters from SIFMA; STB. For example, those commenters noted that Exempt Investors are largely investors who have held the shares since prior to the issuer's IPO and, as such, their original ownership is already materially disclosed in the IPO prospectus. *Id*. In addition, those commenters noted that to the extent an Exempt Investor's beneficial ownership either exceeds 10% or exceeds their pre-IPO beneficial ownership level, it will be required to make Section 16 filings or make an initial Schedule 13D filing. *Id*.

230 *See* letter from ICI I.

231 *See* letters from ABA; MSBA. For example, those commenters noted that a Schedule 13G filed by a Passive Investor does not include information about potential changes in control and that Passive Investors must certify that they do not have a control intent. *Id*. Those commenters also noted that the proposed amendments to Rule 13d-5 include a "tipper-tippee" provision with respect to the filing of a Schedule 13D but not with respect to the filing of a Schedule 13G, *see* letter from MSBA, and stated that accelerating the filing deadline for Exempt Investors will provide no additional information to the market given that the vast majority of Exempt Investors become Exempt Investors following the effectiveness of a registration statement which contains all of the information, if not more, that would be included in a Schedule 13G. *See* letter from ABA.

232 *See* letters from ABA; MFA.

Several commenters also expressed concern regarding administrative burdens associated with the proposed amendments to Rules 13d-1(b) and (d).[233] Some commenters noted that beneficial owners often file a Schedule 13G for multiple different issuers, which "strains" their filing resources at the end of the reporting period.[234] One commenter stated that a month-end-based reporting deadline applicable would burden the external resources (including outside counsel, filing agents, and the EDGAR system) needed to prepare and make these filings given that all QIIs and Exempt Investors would be performing the Schedule 13G filing analysis during the same five-business day period.[235] One commenter expressed concern that the proposed amendment to Rule 13d-1(b) could create practical difficulties for QIIs, including insufficient time to validate the data to be included in a consolidated filing for a large institutional investor with multiple entities.[236] And, one commenter expressed concern that institutional investors and other unregistered entities may lack the infrastructure and personnel to comply with the revised filing deadlines and described year-round monitoring of beneficial ownership reporting obligations and the filing deadlines that would be required under the proposed amendments as burdensome.[237]

Other commenters expressed similar concerns that the proposed amendment to Rule 13d-1(b) would increase QIIs' filing burdens significantly, without material benefit to investors.[238]

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233 *See, e.g.*, letters from ABA; IAA; ICI I; Perkins Coie; SSC; STB; *see also* letter from MFA & NAPFM.

234 *See* letters from IAA; ICI I.

235 *See* letter from STB. The commenter also asserted that the proposed five-business day period after month-end is not enough time for outside counsel to gather the requisite information from their clients and prepare a Schedule 13G filing and expressed concern that investors may not be able to obtain EDGAR filing codes in time to meet the proposed deadlines, noting that the Commission recently has been taking three to five business days (and even longer during busy periods) to generally provide such codes. *Id.*

236 *See* letter from SSC; *see also* letter from IAA.

237 *See* letter from Perkins Coie.

238 *See, e.g.*, letters from ABA; ICI I; SIFMA.

Some of those commenters disagreed with the Commission's statement that QIIs already have systems in place to monitor their beneficial ownership levels and asserted that the proposed amendment would require significant changes to their operational systems and processes.[239] One commenter disagreed with the Commission's statement that the proposed amendments only would require QIIs to monitor the beneficial ownership levels on a monthly basis, suggesting instead that the proposed amendments would require daily monitoring.[240] Another commenter expressed concern that, as a practical matter, the proposed five-day deadline under Rule 13d-1(c) would be impossible to comply with in most cases.[241] The same commenter also stated that Exempt Investors that are not affiliated with the issuer are unlikely to become aware of their potential beneficial ownership reporting obligations in a timely manner and, therefore, may be unlikely to be able to comply with the proposed deadline under Rule 13d-1(d) given the practical challenges associated with making a Schedule 13G filing.[242]

Some commenters expressed concern that the proposed deadlines would be unduly burdensome for smaller and non-institutional beneficial owners,[243] with one commenter stating that by increasing overhead costs and expanding an already complex regulatory regime, the Commission's accelerated timeline will render it particularly difficult for smaller managers, who

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239 *See* letters from ICI I; SIFMA.

240 *See* letter from SIFMA.

241 *See* letter from MSBA. For example, the commenter explained that obtaining EDGAR filing codes by making a Form ID filing requires the assistance of counsel and that such filing usually takes 7 days to be processed by the Commission, by which time the proposed deadline will have passed given that many Passive Investors are unaware of their Schedule 13G filing obligations until after they have crossed the 5% threshold. *Id.* The commenter also asserted that even if a Passive Investor is aware of its Schedule 13G filing obligation before it has crossed the 5% threshold, it is unlikely to take steps to prepare for such obligation before actually crossing the threshold. *Id.* In addition, the commenter noted that many Schedule 13G filings have multiple filing persons, which requires even more time in the preparation of the filing and the engagement of counsel to help prepare the filing. *Id.*

242 *Id*.

243 *See, e.g.*, letters from A. Day; E. Fraser; MFA.

cannot readily bear the costs and administrative burden of monthly filings.[244] Some commenters also asserted that the proposed amendment to Rule 13d-1(b) raises significant concerns regarding harm to investment advisers and funds and would impose substantial unnecessary costs on their clients.[245] Similarly, some commenters stated that the proposed amendment to Rules 13d-1(b) and (d) would create a significant risk of prematurely disclosing sensitive portfolio holdings information to the market, which may result in front-running, copycatting, and other abusive trading practices that harm advisers and their clients, including funds and their investors.[246] And, more generally, one commenter expressed concern that the proposed amendments would create significant reporting and monitoring burdens for all Schedule 13G filers.[247]

Opposing commenters also highlighted some other potential risks associated with the proposed deadlines. For example, one commenter expressed concern that reporting within such a short time period under the proposed amendment to Rule 13d-1(b) would increase the risk reported information would subsequently need to be revised through amendments to Schedule 13G, potentially confusing the market.[248] One commenter asserted that the proposed amendments would increase the number of unintentionally inaccurate filings.[249] One commenter expressed concern that the proposed amendments could negatively impact the ability of investors

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244 *See* letter from MFA.

245 *See* letters from ICI I; MFA.

246 *See* letters from IAA; ICI I.

247 *See* letter from Perkins Coie.

248 *See* letter from ICI I.

249 *See* letter from ABA.

and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[250] Another commenter stated that the proposed amendments could be more broadly disruptive to trading.[251]

Finally, several opposing commenters expressed concern that the proposed amendments do not reflect the differences between Schedule 13D and 13G filers (particularly QIIs) based on the legislative and administrative history of Sections 13(d) and (g) of the Exchange Act.[252] And, other commenters expressed concern that the proposed amendment to Rule 13d-1(b) would be unprecedented and inappropriate, unnecessary to accomplish the Commission's regulatory objectives, and inconsistent with the intent and administrative history of the rules under Sections 13(d) and 13(g).[253]

The opposing commenters also provided some recommendations regarding the proposed amendments. A number of those commenters suggested a quarter-end-based initial Schedule 13G filing deadline for QIIs and Exempt Investors rather than a month-end-based deadline. For example, some commenters recommended that QIIs be required to file their initial Schedule 13G within 45 days after the end of a calendar quarter as of which the QII beneficially owns more than five percent of a covered class to align with the filing timeframe under Section 13(f) and better reflect the distinction the Commission has historically made between QIIs and other institutional investors.[254] Similarly, some commenters recommended that the Commission require that both QIIs and Exempt Investors file their initial Schedule 13G 45 days after the end

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250 *See* letter from STB; *see also supra* note 102.

251 *See* letter from TRP. Specifically, the commenter posited that there would be additional trading and volatility in certain issuers just after the reporting deadline each month, as institutional investors begin the process of accumulating or reducing positions, followed by reduced liquidity leading up to the reporting deadline, as they concluded that trading. *Id*.

252 *See* letters from ABA; ICI I.

253 *See id*.

254 *See* letters from Dodge & Cox; ICI I; SIFMA.

of a calendar quarter, consistent with the Form 13F[255] filing deadline.[256] One commenter recommended that QIIs be required to file their initial Schedule 13G within 15 business days after the end of a calendar quarter as of which the QII beneficially owns more than five percent of a covered class.[257] Another commenter recommended that QIIs be required to file their initial Schedule 13G on a quarterly basis with at least a 30-day period before the filing deadline.[258]

Opposing commenters also made alternative suggestions regarding the proposed amendments. For example, one commenter recommended that QIIs and Exempt Investors be required to file their initial Schedule 13G within 10 days after the end of the month in which its beneficial ownership exceeds five percent as of month-end.[259] Another commenter recommended that to the extent the Commission is concerned about Schedule 13G filers acquiring additional shares after crossing the five percent threshold without public disclosure, it should prohibit trading after crossing the five percent threshold rather than accelerating the filing deadlines.[260] One commenter suggested that if the Commission seeks to apply the proposed amendments to a broad set of investors whose activities are largely unrelated to matters of corporate control, or where such matters may be implicated but are already subject to disclosure requirements under

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255 *See infra* note 280 for a discussion of Form 13F and its filing deadlines.

256 *See* letters from IAA; MFA; *see also* IAC Recommendations (recommending that the Commission shorten the initial filing deadlines for QIIs and Exempt Investors to 45 days after the end of a calendar quarter). One of the commenters stated that a quarterly deadline would increase transparency for market participants as compared with the current annual deadline and noted that institutional investment managers are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings and are more equipped to submit accurate Schedule 13G filings with the same frequency. *See* letter from IAA. The commenter also asserted that aligning the deadlines for initial Schedule 13G filings with Form 13F filings would strike the right balance between the Commission's concerns about information asymmetry in the marketplace, and advisers' concerns about operational strains and competitive disadvantages that would come with publicly exposing their positions more frequently. *Id.*

257 *See* letter from SSC.

258 *See* letter from TRP.

259 *See* letter from ABA.

260 *See* letter from MSBA.

the existing disclosure regime, it should conduct further study and analysis to better understand what percentage of such investors ever are implicated in actual change in control scenarios—to determine the percentage of activist matters where earlier and more frequent disclosure of such investors' holding would have been materially beneficial to investors.[261] Another commenter recommended that rather than adopting the proposed amendments, the Commission should add a column to Form 13F requiring filers to explicitly note, for each listed class of securities, whether the filer has acquired over five percent beneficial ownership during the reporting period.[262] And, one commenter recommended that the Commission consider extending the filing deadline for Passive Investors (*e.g.*, to 15 or 30 days) rather than accelerating it.[263]

In addition, some supporting commenters recommended that the Commission consider further shortening the initial Schedule 13G filing deadlines.[264] Those commenters, however, did not specify alternative deadlines that the Commission should adopt.[265]

Finally, some commenters that neither clearly supported nor opposed the proposed amendments made recommendations to the Commission. One commenter expressed the view that there should not be filing differences between institutional investors and Passive Investors and suggested that certain institutional investors should have more stringent filing requirements

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261 *See* letter from STB. The commenter also suggested that if the Commission's goal is market transparency more generally, and not a targeted concern related to matters of corporate control, the Commission should consider whether more appropriate tools exist to disclose 5% beneficial ownership or material changes to such positions in a more concise and efficient manner, using Form 13F as an example. *Id*.

262 *See* letter from MFA.

263 *See* letter from E. Fraser. The commenter also recommended that the Commission consider a provision for when a shareholder's position goes over the 5% threshold because of ordinary corporate actions that result in the number of outstanding shares to drop such that the shareholder unwittingly has a holding over the 5% of outstanding shares and suggested recommended that the Commission consider increase the threshold from greater than 5% beneficial ownership to 10%. *Id.*

264 *See* letters from AFREF; Freeport-McMoRan; HMA I.

265 *Id*.

than Passive Investors.[266] Several other commenters recommended that the Commission require Passive Investors to file an initial Schedule 13G in five business days rather than five calendar days.[267]

c. Final Amendments

We are amending Rules 13d-1(b) and (d) to shorten the initial Schedule 13G filing deadlines under those rules, with some modifications from the proposals in response to commenter concerns. Specifically, we are adopting an initial Schedule 13G filing deadline of 45 days[268] after calendar quarter-end for QIIs and Exempt Investors. In addition, consistent with our amendment to the initial Schedule 13D deadline, we are amending Rule 13d-1(c) to require that Passive Investors file their initial Schedule 13G within five business days after the date on which the Passive Investor acquired beneficial ownership of more than five percent of a covered class.

As noted above, Rules 13d-1(b) and (d) currently require QIIs and Exempt Investors, respectively, to file an initial Schedule 13G within 45 days after calendar year-end if, as of the end of that year, they beneficially own more than five percent of a covered class. We are amending Rules 13d-1(b) and (d) to require that QIIs and Exempt Investors file their initial Schedule 13G within 45 days after calendar quarter-end if, as of the end of that quarter, their beneficial ownership exceeds five percent of a covered class (rather than five business days after the end of the month in which beneficial ownership exceeds five percent, as proposed). Further,

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266 *See* letter from J. Dunlop.

267 *See* letters from ABA; Dodge & Cox; IAA; ICI I. Some of these commenters suggested that a five-business day deadline would be more appropriate in light of the steps required to prepare and file an accurate Schedule 13G. *See* letters from Dodge & Cox, IAA; ICI I; *see also supra* note 130.

268 If the deadline falls on a Federal holiday, a Saturday, or a Sunday, then the filing may be made on the next business day thereafter. 17 CFR 240.0-3 ("[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following.").

because we are adopting the new 45 days after quarter-end deadline rather than the proposed five business days after month-end deadline, we are not adopting the proposed amendment to delete the language in Rule 13d-1(b)(2) that imposes an accelerated initial reporting obligation.[269] Instead, we are amending that rule to require that such an initial Schedule 13G be filed within five business days (instead of the current requirement of 10 days) after the end of the first month in which the QII's beneficial ownership exceeds 10 percent of a covered class, computed as of the last day of the month.

The Commission adopted the current initial Schedule 13G filing deadlines of 45 days after year-end in Rules 13d-1(b) and (d) in the late 1970s.[270] In light of the technological advancements and developments in the financial markets in the more than 40 intervening years,[271] we believe it is appropriate to shorten those deadlines to ensure beneficial ownership information disclosed in an initial Schedule 13G is reported in a manner that is considered timely by modern standards. We also expect that shortening those deadlines from year-end to quarter-end will reduce the risk that QIIs and Exempt Investors sell down their positions before the end of the year and avoid reporting altogether,[272] which should help to ensure large accumulations of

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269 *See* Proposing Release at 13856 ("Given the proposal to shorten the initial reporting deadline [in Rule 13d-1(b)] to five business days after the end of the month, the current provision of Rule 13d-1(b)(2) that operates to accelerate that initial filing deadline if beneficial ownership exceeds 10% at the end of any month would be unnecessary . . . .").

270 *See supra* notes 197, 199 and accompanying text.

271 *See supra* notes 138-144 and accompanying text for some examples of those advancements and developments.

272 *See, e.g.*, Kristin Giglia, Note, *A Little Letter, a Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings*, 116 COLUM. L. REV. 105, 115-16 (2015) (explaining that the availability of Schedule 13G may allow investors to "intentionally structure their acquisition strategies to exploit the gaps created by the current reporting regime, to their own short-term benefit and to the overall detriment of market transparency and investor confidence" (internal quotations omitted)). QIIs in particular may be able to amass sizeable amounts of beneficial ownership without reporting such positions. Rule 13d-1(b)(2) provides in relevant part that "it shall not be necessary to file a Schedule 13G unless the percentage of [a

beneficial ownership are reported in a timely manner, ultimately improving market transparency.[273]

In the Proposing Release, the Commission stated its expectation that the proposed initial Schedule 13G deadlines under Rules 13d-1(b) and (d) (*i.e.*, five business days after the end of the month in which beneficial ownership exceeds five percent of a covered class) would result in minimal additional burdens on filers because QIIs and Exempt Investors "already have well-established compliance systems in place to monitor Schedule 13G ownership levels to determine whether filing obligations have been triggered."[274] Although some commenters agreed with this expectation,[275] several comments disagreed and asserted that the proposed deadlines would be unduly burdensome for QIIs and Exempt Investors (especially those that are smaller and non-

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covered class] beneficially owned as of the end of the calendar year is more than five percent." 17 CFR 240.13d-1(b)(2). As such, a QII may beneficially own in excess of 5% of a covered class for the entire year, sell down its position to 5% or below on the last day of the calendar year and bypass having to report at all under the current regulatory framework assuming that its beneficial ownership continues to be held in the ordinary course of business, without a disqualifying purpose or effect, and does not exceed 10% of a covered class.

273 We note that some commenters asserted that the Commission did not substantiate its concerns regarding reporting gaps and QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing. *See supra* note 226 and accompanying text. Given the potential materiality of the information disclosed on Schedule 13G and its importance to the market, however, we believe it is appropriate to take action to reduce the risk of such reporting gaps, even absent evidence indicating that the practice of selling down positions to avoid a Schedule 13G filing currently is widespread. *See* Proposing Release at 13882, n.221 (noting the importance to the market of information regarding beneficial ownership, regardless of whether it is disclosed on Schedule 13D or 13G, based on evidence that the initial filing of Schedule 13G, like that of Schedule 13D, generates a positive stock price reaction, albeit smaller in magnitude). We also recognize that because the new filing deadline will be tied to a QII's beneficial ownership as of calendar quarter-end, QIIs may still be able to avoid a reporting obligation if they sell down their positions before the end of a quarter. We believe, however, that risk is lower under a quarter-end-based deadline than a year-end-based deadline because of the increased transaction costs, as well as disruptions with respect to a long-term investment strategy, that would be associated with selling down and building up positions multiple times throughout a year.

274 Proposing Release at 13856 (noting that "QIIs currently need to monitor beneficial ownership levels at least on a monthly basis in case their holdings exceed more than 10% at the end of the month" and that "Exempt Investors already need to monitor the level of their beneficial ownership continuously or periodically to ensure that the amount of their beneficial ownership does not unintentionally exceed 2% in a 12-month period").

275 *See supra* note 216 and accompanying text (describing and citing comment letters that asserted that the proposed amendments would not impose significant burdens on Schedule 13G filers).

institutional investors) given the number of tasks and amount of resources required to prepare a filing in such a limited amount of time[276] and that such burdens are not sufficiently mitigated by any technological advancements to justify adopting the proposed deadlines.[277]

Based on commenters' observations regarding the potentially significant burdens that the proposed deadlines would impose on QIIs and Exempt Investors, we have decided to take a different approach from the proposal and instead amend Rules 13d-1(b) and (d) to require an initial Schedule 13G be filed within 45 days after calendar quarter-end. This change to a quarter-end-based deadline, rather than the proposed month-end-based deadline, is consistent with the recommendations that a number of commenters made to the Commission.[278] We note that those commenters recommended various different numbers of days after quarter-end for the deadline.[279] Taking into account those various recommendations, believe that 45 days is the appropriate length of time because it aligns with the filing deadline for Form 13F,[280] and many institutional investment managers who file a Schedule 13G are already reviewing and assessing

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276 *See supra* notes 233-247 and accompanying text.

277 *See supra* notes 219-225 and accompanying text.

278 *See supra* notes 254-258 and accompanying text.

279 *See* letters from Dodge & Cox (recommending a filing deadline of 45 days after quarter-end); IAA (same); ICI I (same); MFA (same); SIFMA (same); TRP (recommending a filing deadline of at least 30 days after quarter-end); SSC (recommending a filing deadline of 15 business days after quarter-end).

280 Form 13F is the reporting form filed by institutional investment managers pursuant to Section 13(f) of the Exchange Act. Under Section 13(f)(1), institutional investment managers that use the U.S. mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over $100 million or more in Section 13(f) securities must file Form 13F. Such institutional investment managers must submit four Form 13F filings, with the first filing due within 45 days after the end of the fourth quarter of the calendar year (*i.e.*, the quarter ending Dec. 31 of the same calendar year that the $100 million filing threshold is reached) and the three additional filings due 45 days after the end of the subsequent three calendar quarters (*i.e.*, the calendar quarters that end on Mar. 31, June 30, and Sept. 30). *See* 17 CFR 240.13f-1(a)(1); *see also* U.S. SECURITIES & EXCHANGE COMMISSION, DIVISION OF INVESTMENT MANAGEMENT, *Frequently Asked Questions About Form 13F*, *available at* https://www.sec.gov/divisions/investment/13ffaq.

their holdings on a quarterly basis in order to prepare Form 13F filings.[281] In addition, although most of the other amended Schedule 13D and 13G filing deadlines will be expressed in "business days," we believe the potential compliance benefits of aligning the initial Schedule 13G filing deadlines for QIIs and Exempt Investors with the Form 13F filing deadline justify using calendar days rather than business days.[282]

Even for those QIIs and Exempt Investors that are not Form 13F filers, the 45-day period after calendar quarter-end deadline will be familiar given that they currently must file their initial Schedule 13G within 45 days after calendar year-end.[283] As such, we believe that many of those beneficial owners are well-positioned to submit their Schedule 13G filings within 45 days after calendar quarter-end. This deadline, therefore, is likely to be less burdensome and should require fewer changes to QIIs' and Exempt Investors' existing compliance operations than the proposed month-end-based deadline. We also expect that the extended filing deadline (*i.e.*, 45 days rather than the proposed five business days) will address some commenters' concerns that the more compressed time period under the proposed deadlines could have negatively impacted the accuracy and usefulness of initial Schedule 13G filings.[284]

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281 *See infra* Section IV.B.3.b, Table 4 (presenting statistics regarding the number of Schedule 13G filers that also filed Form 13F in 2022, noting that 84% of QIIs and 10% of Exempt Investors also filed Form 13F).

282 *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

283 In addition, the amended deadline may result in the same amount of time to file as under the current rules, depending on the quarter in which the filing obligation is triggered. That is, if a QII or Exempt Investor becomes the beneficial owner of more than 5% of a covered class on or after Oct. 1 (the beginning of the fourth calendar quarter) and remains above the 5% threshold as of Dec. 31 (both calendar year-end and the end of the fourth calendar quarter), then they would have the same amount of time to prepare and submit their initial Schedule 13G filing under both the current and amended Rules 13d-1(b) and (d).

284 *See supra* notes 248-250 and accompanying text.

Further, a 45-day, quarter-end-based deadline (instead of the proposed five-business day, month-end-based deadline) should help mitigate concerns that some opposing commenters expressed regarding the risk of QIIs and Exempt Investors prematurely disclosing sensitive portfolio holdings information to the market (*i.e.*, "front-running" and "free-riding"),[285] especially given that many of those Schedule 13G filers already are obligated to disclose their holdings via Form 13F on a quarterly basis. We also believe that, as compared with the current year-end-based deadline, a quarter-end-based deadline will increase transparency for market participants and better reflects the technological advancements and developments in the financial markets since the Commission adopted Rules 13d-1(b) and (d).[286] Thus, we believe that this deadline will address the goals that prompted the Commission's reassessment of those rules in the Proposing Release while, at the same time, avoiding inordinately burdening Schedule 13G filers.

In addition, as discussed above, Rule 13d-1(c) currently requires Passive Investors to file an initial Schedule 13G within 10 days of acquiring beneficial ownership of more than five percent of a covered class. As with our final amendment to Rule 13d-1(a), we are amending Rule 13d-1(c) to require that Passive Investors file their initial Schedule 13G within five business days after[287] acquiring beneficial ownership of more than five percent of a covered class. We believe it is appropriate to amend the initial Schedule 13G filing deadline in Rule 13d-1(c) to match the initial Schedule 13D filing deadline in Rule 13d-1(a) in order to maintain the historical

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285 *See supra* note 246 and accompanying text; *see also infra* Section IV.C.2.b.

286 *See, e.g.*, letter from IAA ("A quarterly deadline significantly increases transparency for market participants as compared with the current annual deadline.").

287 See *supra* note 136 for a discussion of a revision we are making to Rule 13d-1(c) to clarify that the five-business day deadline is determined beginning on the day *after* the date on which a person acquires beneficial ownership of more than 5% of a covered class.

regulatory consistency between the deadlines in Rules 13d-1(c) and (a) and to facilitate the overall goals of increasing transparency in beneficial ownership and ensuring that investors receive material information in a timely manner.

Consistent with our rationale for shortening the initial Schedule 13D deadline, we believe that many Passive Investors are large and sophisticated enough to prepare and file an initial Schedule 13G within five business days.[288] The change to a five-business day deadline from the proposed five-calendar day deadline should mitigate commenters' concerns regarding the burdens that a shortened deadline would impose on Passive Investors and the workability of that deadline.[289] Further, we note that research indicates that at least some beneficial owners may improperly rely on Rule 13d-1(c) to file a Schedule 13G in lieu of a Schedule 13D to obscure their control purpose.[290] Given this increased likelihood, as compared to QIIs and Exempt Investors,[291] of Passive Investors ultimately having a control purpose with respect to an issuer, we believe it is appropriate to shorten their initial Schedule 13G filing deadline to five business days in order for that deadline to continue to mirror the initial Schedule 13D filing deadline. This

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288 See, for example, *infra* Section IV.B.3.b, Table 4, which indicates that 31% of Passive Investors that filed a Schedule 13G in 2022 also filed a Form 13F (which would only be required if, among other things, they exercise investment discretion over $100 million or more in Section 13(f) securities).

289 *See supra* note 241 and accompanying text.

290 *See* Kristin Giglia, Note, *A Little Letter, a Big Difference: An Empirical Inquiry into Possible Misuse of Schedule 13G/13D Filings*, 116 COLUM. L. REV. 105, 119 (2015) ("Activists can fly under the radar, planning to effect large changes to the issuer and even acquiring up to twenty percent ownership interest at a relatively low price, all while maintaining that their intent is still 'passive.'").

291 *Id*. at n.160 (noting that QIIs and Exempt Investors are less likely than Passive Investors "to switch to a [Schedule] 13D filing").

is consistent with the Commission's decision to require Passive Investors to file their initial Schedule 13G in 10 days, the same deadline as Schedule 13D, when it adopted Rule 13d-1(c).[292]

3. Rules 13d-2(a) and (b)

Section 13(d)(2) requires that an amendment must be filed to the statement required under Section 13(d)(1) if any material change occurs in the facts set forth in the statement filed. Section 13(d)(2) does not, however, identify a specific deadline by which such amendment must be filed. Instead, Rule 13d-2(a) provides that such amendment must be filed with the Commission "promptly."[293] The obligation to file an amendment under current Rule 13d-2(a) is not limited to acquisitions. Instead, changes in the disclosure narrative that are material also must be reported in an amendment, as must material changes in the level of beneficial ownership caused by an involuntary change in circumstances, such as a reduction in the amount of beneficial ownership caused solely by an increase in the number of shares outstanding.[294]

Section 13(g)(2) requires that an amendment be filed to the statement required under Section 13(g)(1) if any material change occurs in the facts set forth in the statement filed, but like Section 13(d)(2), does not identify a deadline by which such amendment must be filed. Rule 13d-2(b), however, does specify a deadline and provides that for all persons who report beneficial ownership on Schedule 13G, an amendment shall be filed "within forty-five days after

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292 *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, 2854 (Jan. 16, 1998)] (stating that "the Commission is imposing some safeguards" on Passive Investors, including that an "[i]nitial Schedule 13G must be filed within 10 days (instead of year end)" because "a control purpose reflects the state of mind of a filing person and there are incentives to disclose less information"). The Commission also indicated that, as compared to QIIs and Exempt Investors, Passive Investors are more likely to represent "voting blocks that have the potential of affecting or influencing control of the issuer" which, therefore, warrants more timely notice to the market of their existence. *Id*. at 2855.

293 17 CFR 240.13d-2(a).

294 *See id.* (requiring an amendment "[i]f any material change occurs in the facts set forth in the Schedule 13D" including "any material increase or decrease in the percentage of the class beneficially owned").

the end of each calendar year if, as of the end of the calendar year, there are any changes in the information reported in the previous filing on that Schedule [13G]."[295]

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d-2(a) to require that all amendments to Schedule 13D be filed within one business day after the date of the material change that triggers the amendment obligation. The Commission proposed this change from the "promptly" standard to establish a specified filing deadline, remove any uncertainty as to the date on which an amendment is due, and help ensure that beneficial owners amend their filings in a more uniform and consistent manner.[296] The Commission stated that it did not believe that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs would place those filers at a disadvantage.[297] The Commission also stated that because an amendment to a Schedule 13D only requires that the material change be reported and not a complete set of new narrative responses to each of the disclosure form's individual line items,[298] it expected that those amendments should present a lower administrative burden than the initial Schedule 13D filing.[299] In addition, the Commission noted that that the proposed amendment would be consistent with its existing view that, under the current "promptly" standard in Rule 13d-2(a), "[a]ny delay beyond the date the filing reasonably can be

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295 17 CFR 240.13d-2(b).

296 Proposing Release at 13857.

297 *Id*.

298 Under Rule 13d-2(a), the Schedule 13D filer only has an obligation to "file or cause to be filed with the Commission an amendment disclosing that [material] change." See also 17 CFR 240.12b-15, titled "Amendments," which explains that "[a]mendments filed pursuant to this section must set forth the complete text of each item as amended."

299 Proposing Release at 13857.

filed may not be prompt" and that an amendment to a Schedule 13D reasonably could be filed in as little as one day following the material change.[300]

The Commission also proposed to amend Rule 13d-2(b) to require that a Schedule 13G be amended within five business days of the end of the month in which a material change occurs in the information previously reported. The Commission stated that accelerating the deadline for amendments from the current standard of 45 days after the end of the calendar year would help ensure that the information reported would be timely and useful.[301] The Commission also noted that this proposed deadline would be consistent with the proposed five-business day deadline from the end of the month applicable to QIIs' and Exempt Investors' initial Schedule 13G filing obligations arising under Rules 13d-1(b) and (d).[302] In addition, the Commission proposed a "business day" standard for the proposed deadline to partially mitigate the time pressures resulting from the reduction of the current 45-day deadline.[303]

The Commission further proposed to amend Rule 13d-2(b) to substitute the term "material" in place of the term "any" to serve as the standard for determining the type of change that will trigger an amendment obligation under Rule 13d-2(b). The Commission noted that, unlike Sections 13(d)(2) and 13(g)(2), Rule 13d-2(b) does not include an express materiality qualifier for Schedule 13G amendments and simply requires an amendment for "any change."[304] At the time Rule 13d-2(b) was adopted, however, the Commission stated that there is a

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300 *Id.* at n.67 (quoting *In re Cooper Laboratories*, Release No. 34-22171 (June 26, 1985)).

301 *Id*. at 13857.

302 *Id*.

303 *Id*.

304 *Id*. at 13857-58.

materiality standard inherent in the provisions governing Schedule 13G filings.[305] This inherent materiality standard is based on the fact that any disclosure provided by a Schedule 13G filer, in light of the infrequency of the reports and comparatively minimal statements required to be made, is effectively material.[306] The Commission's proposed change, therefore, was intended to merely codify this view in the text of Rule 13d-2(b).

b. Comments Received

The Commission received a variety of comments on the proposed amendments to Rules 13d-2(a) and (b). Several commenters supported the proposed amendments.[307] Some of those commenters supported revising the Schedule 13D and 13G amendment deadlines for many of the same reasons they supported accelerating the initial Schedule 13D and 13G filing deadlines.[308]

In addition, several commenters supported the proposed amendments to Rules 13d-2(a) and (b) based on changes in technology and developments in the financial markets.[309] One commenter agreed with the concern in the Proposing Release that material information about potential change of control transactions is not being disseminated to the public in a manner that would be considered timely in today's financial markets.[310] Other commenters asserted that the

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305 *Id.* at 13858.

306 *Id.* (citing Filing and Disclosure Release at 18489 (stating the Commission's belief that because "the information required by Schedule 13G has been reduced to the minimum necessary to satisfy the statutory purpose, . . . a materiality standard is inherent in those requirements" and "it is unnecessary to further minimize it by the insertion of an express materiality standard")).

307 *See, e.g.*, letters from AFREF (supporting only the proposed amendment to Rule 13d-2(a)); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; BRT (same); C. Robinson; Engineer; FedEx; Freeport-McMoRan; HMA I; Jonah; J. Pieper; J. Soucie; Juan; Mark C.; Mike; Nasdaq; P. Worts; SIFMA AMG (same); TIAA (same); T. Mirvis, et al. (same); Todd. In addition, one commenter, which neither clearly supported nor opposed the proposed amendment to Rule 13d-2(b), supported the proposed shift from an "any change" to a "material change" standard. *See* letter from IAA.

308 *See supra* notes 38-41, 43-44 and accompanying text; *see also supra* note 211 and accompanying text.

309 *See, e.g.*, letters from BRT; C. Robinson; FedEx; Freeport-McMoRan; Nasdaq; T. Mirvis, et al.

310 *See* letter from BRT.

proposed amendments would not impose significant costs or burdens on beneficial owners of more than five percent of a covered class[311] and that the proposed amendments would be consistent in balancing the need for adequate disclosures to investors with burdens placed on filers to accurately prepare required disclosures.[312]

A number of commenters opposed the proposed amendments to Rules 13d-2(a) and (b).[313] Several commenters disagreed with the Commission's technological advancement-based justifications for the proposed acceleration of the beneficial ownership reporting deadlines,[314] some of whom raised many of the same concerns that they expressed with respect to the proposed acceleration of the initial Schedule 13D and 13G filing deadlines.[315] One commenter stated that filing a Schedule 13D amendment is not just a question of technology, but often a question of marshalling complex and evolving facts and making difficult disclosure judgments.[316]

Some commenters focused solely on the proposed amendment to Rule 13d-2(a), expressing concern that a one-business day deadline would be unduly burdensome and may not

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311 *See, e.g.*, letters from Anonymous 11; BRT; J. Soucie.

312 *See* letter from FedEx.

313 *See, e.g.*, letters from A. Day; ABA (opposing only the proposed amendment to Rule 13d-2(a)); AIMA; B. Mason; Dodge & Cox; EEI (same); EIM I (same); Hoak and Co. (Apr. 11, 2022) ("Hoak") (same); ICI I; MFA; MSBA (same); NVCA (same); Perkins Coie; SIFMA (opposing only the proposed amendment to Rule 13d-2(b)); SIFMA & SIFMA AMG (same); SSC (same); STB; TRP (same).

314 *See, e.g.*, letters from ABA; Dodge & Cox; IAA; ICI I; TIAA.

315 *See supra* notes 92-94, 220-224 and accompanying text.

316 *See* letter from ABA. The commenter also noted that filing a Schedule 13D amendment depends on many factors, including the complexity of the information, the pace of developments of the information, and the number of persons or parties who have an interest in the disclosure and need to review the information, contribute to its drafting, and, if they are signing the Schedule 13D, are subject to liability for the accuracy of the information. *Id*.

be enough time to prepare a Schedule 13D amendment in all circumstances.[317] For example, one commenter stated that in its experience, it generally takes two to three business days, and in some cases longer, to compile and file such amendments.[318] One commenter noted that if the Commission adopts the proposed structured data requirements,[319] this will add more time to the process of preparing a Schedule 13D amendment and may make the proposed one-business day deadline impractical.[320] Another commenter asserted that the proposed extension of the filing "cut-off" time to 10 p.m.[321] would not be sufficient to offset the burden associated with meeting the proposed one-business day deadline for a Schedule 13D amendment.[322]

Further, several commenters expressed concerns regarding the effect of the proposed amendment to Rule 13d-2(a) on the accuracy of Schedule 13D amendments.[323] For example, one of those commenters asserted that the proposed amendment would make filing accurate amendments nearly impossible.[324] Some commenters expressed concern that by providing Schedule 13D filers with insufficient time to prepare and file amendments, the proposed

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317 *See, e.g.*, letters from ABA; AIMA; EIM I; Hoak; ICI I; MFA; MSBA; Perkins Coie; STB; *see also* letter from MFA & NAPFM.

318 *See* letter from STB. The commenter also noted that while the one-business day deadline may be feasible for an investor engaged in a change of control objective, as that investor may have (1) been taking preparatory steps toward such goal, (2) an internal deal team and external advisors actively engaged in the project, and (3) built the Schedule 13D amendment obligation into its workstream, there are many situations requiring a Schedule 13D amendment in which such advance notice and planning is not possible or practical. *Id*. The commenter further asserted that practical concerns regarding the ability to file an amendment pursuant to Rule 13d-2(a) in a timely manner may cause some Schedule 13D filers to avoid filing amendments for changes in their Schedule 13D disclosures, preferring to take more risk that their determination on materiality is later questioned than risk having a "late" filing with the Commission. *Id.*

319 See *infra* Section II.F for a discussion of the proposed structured data requirement for Schedules 13D and 13G.

320 *See* letter from ABA.

321 *See infra* Section II.A.5 for a discussion of the proposed extension of the filing "cut-off" time for Schedules 13D and 13G.

322 *See* letter from Hoak.

323 *See, e.g.*, letters from ABA; EEI; Hoak; MFA; NVCA.

324 *See* letter from NVCA.

amendment would increase the likelihood of errors and risk of liability.[325] Another commenter noted that the proposed amendment to Rule 13d-2(a) could decrease transparency by increasing the risk of errors in Schedule 13D amendments.[326]

Commenters also expressed concerns about other potential downsides associated with the proposed amendment to Rule 13d-2(a). For example, some commenters expressed concern that the proposed amendment could negatively impact the ability of investors and their advisors to draft meaningful disclosures and engage in thoughtful analysis.[327] Some commenters noted that the proposed amendment to Rule 13d-2(a) may not leave adequate time to prepare the filing in the event of unforeseen circumstances, including the possibility that a necessary approver or signer may not be available.[328] And, one commenter stated that there have been very few, if any, abuses associated with the current "promptly" regime and asserted that it has worked well and effectively.[329]

In addition, some commenters questioned the basis for the proposed amendment to Rule 13d-2(a). For example, some commenters noted that a one-business day deadline for Schedule 13D amendments would be more restrictive than the filing deadline for a Form 8-K.[330] Similarly,

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325 *See, e.g.*, letters from EIM I; Hoak; MFA.

326 *See* letter from Hoak.

327 *See* letters from ABA; STB; *see also supra* note 102.

328 *See* letters from EEI; Hoak.

329 *See* letter from AIMA.

330 *See* letters from EIM I; MFA. Those commenters also stated that the Commission has not justified imposing such a restrictive deadline on Schedule 13D amendments, especially given the relatively importance of a Form 8-K. *Id.* One of those commenters noted that Schedule 13D amendments often disclose agreements between the beneficial owner and the issuer, and issuers typically have four business days to publicly disclose such agreements on Forms 8-K after entering into them and often prefer to be the first to disclose in order to control the initial message to the market, and the proposed deadline would deprive issuers of this opportunity. *See* letter from MFA. The commenter also asserted that the proposed Schedule 13D amendment deadline would make it more difficult for issuers and Schedule 13D filers to

some commenters noted that Form 8-K and Section 16 filings do not have as restrictive filing deadlines as proposed under Rule 13d-2(a).[331] One commenter asserted that the "promptly" standard under Rule 13d-2(a) has "generally been understood" to mean within two business days and disagreed with the Proposing Release that Commission precedent supports a one-business day interpretation of that standard.[332]

Further, one commenter stated that the proposed amendment to Rule 13d-2(a) would "unnecessarily sacrifice" the flexibility that the current version of the rule provides.[333] Other commenters noted that the promptness of a Schedule 13D amendment filing obligation under Rule 13d-2(a) currently is determined by considering the facts and circumstances related to such filing and urged the Commission to continue to consider the variation in circumstances that can lead to an amendment obligation rather than applying the same standard in all circumstances.[334] One commenter asserted that the proposed amendment to Rule 13d-2(a) could lead to a large increase in the number of late Schedule 13D amendment filings.[335]

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coordinate their messages regarding material agreements they have entered into and may force investors to publicly disclose an agreement in principle through a Schedule 13D amendment before the terms are finalized, creating the risk of prematurely disseminating information to the market that turns out to be inaccurate or incomplete. *Id*.

331 *See* letters from MFA; STB. Those commenters also asserted that the Form 8-K and Section 16 filing deadlines acknowledge the balance between the importance of getting disclosures to investors in a timely manner, with the complexity and labor required in order to create such filings in a complete and thoughtful manner, noting that Section 16 filings require even less narrative disclosure than a Schedule 13D amendment. *Id*.

332 *See* letter from EIM I.

333 *See* letter from ABA. The commenter stated that, as the Commission has acknowledged in the past, in order to serve the policies of the Williams Act, the timing for public filings should vary based on the circumstances. *Id.*

334 *See* letters from MFA; STB. The commenters noted, for example, that a one-business day deadline may not be appropriate for Schedule 13D amendments with respect to material changes that do not have any nexus to a change or influence in corporate control. *Id*.

335 *See* letter from ABA.

In addition, some commenters expressed concern about the costs of the proposed amendment to Rule 13d-2(a) relative to its benefits. For example, one commenter stated that the proposed amendment to Rule 13d-2(a) does not appropriately balance the need for prompt disclosure of important, market-moving events with the need to avoid imposing an undue, impracticable burden on investors making more routine filings.[336] Another commenter asserted that the burdens and risks of the proposed amendment to Rule 13d-2(a) associated with venture capital funds that make Schedule 13D filings exceed its benefits.[337]

Several commenters[338] opposed the proposed amendment to Rule 13d-2(b) for many of the same reasons that they opposed the proposed acceleration of the initial Schedule 13G filing deadlines for QIIs and Exempt Investors.[339] In addition, one commenter broadly asserted that the costs of the proposed amendment to Rule 13d-2(b) "far outweigh any perceived benefits."[340] Another commenter noted that many Schedule 13G filers have filing obligations with respect to multiple issuers and that the proposed amendment may require "hundreds of filings on a monthly basis, as their investments fluctuate perpetually."[341] And, other commenters expressed the same

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336 *See* letter from MFA.

337 *See* letter from NVCA. Specifically, the commenter asserted that the burden of inaccurate Schedule 13D amendments and the associated risks are far greater than any benefit to be gained from the information that a venture capital fund is reducing its share ownership in the ordinary course of exiting investments and providing returns to limited partner-investors. *Id.* The commenter also noted that the proposed amendment would impose substantial compliance burdens on venture capital funds that make Schedule 13D filings and expressed concern that inaccurate Schedule 13D amendments caused by the proposed accelerated deadline could result in giving the market information that is misleading, particularly to retail investors, which could reduce liquidity and negatively impact an issuer's share price, harming all investors other than short sellers. *Id*.

338 *See, e.g.*, letters from MFA; Perkins Coie; STB; TIAA; TRP.

339 *See supra* notes 226-228, 235-236, 251 and accompanying text.

340 *See* letter from MFA. The commenter further stated that the benefits of the proposed amendment would be minimal because Schedule 13G filers generally do not have control intent and already disclose their holdings on Form 13F. *Id*.

341 *See* letter from MFA.

concerns about the proposed amendments to Rules 13d-2(a) and (b) that they expressed with respect to the proposed acceleration of the initial Schedule 13D and 13G filing deadlines.[342]

Finally, some commenters made recommendations to the Commission regarding the proposed amendments to Rules 13d-2(a) and (b). For example, some commenters that generally supported the proposed amendments recommended that the Commission consider further shortening the filing deadlines.[343] Further, specifically with respect to the proposed amendment to Rule 13d-2(a), one supporting commenter recommended that the Commission include an assets under management-based threshold for the proposed accelerated Schedule 13D filing deadlines.[344] Another commenter that generally supported revising the Schedule 13D amendment deadline recommended that the Commission require that Schedule 13D amendments be filed within three business days.[345]

Conversely, several opposing commenters recommended that the Commission retain the requirement that Schedule 13D amendments be filed promptly, but require that they be filed within no more than a specified number of days after the relevant triggering event (with recommendations varying between two and four business days).[346] One opposing commenter suggested that the Commission require that Schedule 13D amendments be filed within five

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342 *See supra* notes 99, 106, 226, 243 and accompanying text; *see also* letter from MFA & NAPFM.

343 *See* letters from Freeport-McMoRan; HMA I.

344 *See* letter from A. Day.

345 *See* letter from SIFMA AMG.

346 *See, e.g.*, letters from ABA; Dodge & Cox; ICI I; MFA. One of those commenters also noted that to the extent that a Schedule 13D filer is able to file earlier, the filer would still be obligated to do so because the rule would still require prompt filings. *See* letter from ABA. Alternatively, the commenter suggested that the Commission require that certain categories of amendments (*e.g.*, dispositions or acquisitions of beneficial ownership of 1% or more) be filed within a specified one or two business day window. *Id*. Similarly, another commenter recommended that the Commission add a narrative setting forth its timing expectations in different situations for the filing to satisfy the "prompt" standard, including those where a shorter filing deadline would be required. *See* letter from MFA.

business days.[347] Other commenters, which either generally opposed or neither clearly supported nor opposed the proposed amendment to Rule 13d-2(a), recommended that the Commission require that Schedule 13D amendments be filed within two business days.[348]

In addition to focusing on the Schedule 13D filing deadline, some opposing commenters made other recommendations with respect to the proposed amendment to Rule 13d-2(a). For example, one opposing commenter asserted that a Schedule 13D amendment should not be required for involuntary changes in circumstances caused by the issuer because such amendments do not relate to the Schedule 13D filer's action or intent and are already disclosed to the market by the issuer.[349] Another opposing commenter recommended that if the Commission believes that a one-business day interpretation of "promptly" is not being properly observed, it should clarify that in situations involving acquisition of corporate control, "promptly" means one business day.[350] One commenter, which neither clearly supported nor opposed the proposed amendment to Rule 13d-2(a), recommended that the Commission define the percentage

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347 *See* letter from AIMA.

348 *See, e.g.*, letters from EEI; EIM I; Hoak; IAA; Perkins Coie. Several of those commenters asserted that two business days would be consistent with the current general understanding of the "promptly" standard. *See* letters from EIM I; IAA. Some commenters indicated that a one-business day deadline for Schedule 13D amendments would be too "aggressive from an operational perspective," would be extremely difficult for filers to comply with, and could result in inadvertent errors, *see* letter from IAA, and that a two-business day deadline would be less onerous for investors yet would ensure the accuracy and transparency of the information in their filings. *See* letter from EEI.

349 *See* letter from Hoak.

350 *See* letter from STB. The commenter recommended that the Commission engage in further study to determine the percentage of Schedule 13D filers that ultimately engage in activities that impact corporate control and the number of such cases in which a Schedule 13D amendment is not filed within the one-business day timeframe. *Id*. The commenter also suggested that the Commission engage in further study regarding the different circumstances under which Schedule 13D amendments are filed and consider whether requiring such amendments to be filed within the one business day timeframe would materially improve the information provided to investors relating to such issuer control matters. *Id*.

ownership change that is deemed a "material change" as the specified percentage only, and that it omit the subjective "facts and circumstances" part of the standard.[351]

Further, a number of opposing commenters made recommendations regarding the proposed amendment to Rule 13d-2(b). For example, several commenters recommended that the Commission require Schedule 13G amendments to be filed within 45 days after the end of a quarter in which a material change occurred, consistent with the amendment frequency for Form 13F.[352] One commenter recommended that QIIs be required to file an amended Schedule 13G within 20 business days after the end of a quarter in which a material change has occurred.[353] One commenter, which neither clearly supported nor opposed the proposed amendment to Rule 13d-2(b), recommended that the Commission require that Schedule 13G amendments be filed within 10 days after the end of the month in which a material change occurs.[354]

In addition to focusing on the Schedule 13G amendment deadline, some commenters made other recommendations with respect to Rule 13d-2(b). For example, one opposing commenter suggested that the Commission conduct further study and analysis to understand what percentage of Schedule 13G filers are involved in change in control scenarios.[355] A number of commenters, which either generally opposed or neither clearly supported nor opposed the proposed amendment to Rule 13d-2(b), also requested that the Commission clarify what

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351 *See* letter from IAA.

352 *See, e.g.*, letters from Dodge & Cox; IAA; ICI I.

353 *See* letter from SSC. The commenter also recommended that materiality be defined as more than a 5% change in beneficial ownership. *Id*.

354 *See* letter from ABA.

355 *See* letter from STB. The commenter also suggested that if the Commission's goal is market transparency, and not a targeted concern related to matters of corporate control, the Commission should consider whether there are more appropriate tools to disclose significant beneficial ownership positions or material changes to such positions in a more concise and efficient manner (*e.g.*, Form 13F). *Id*.

constitutes a "material change" for Schedule 13G filers.[356] One commenter recommended that the Commission carve out QIIs from the accelerated filing deadline, including because QIIs must certify that they do not have a control intent.[357] And, one commenter recommended that the Schedule 13G amendment filing deadline be expressed in business days.[358]

c. Final Amendments

We are amending Rules 13d-2(a) and (b) to revise the Schedule 13D and 13G amendment filing deadlines under those rules. In response to commenter concerns, however, we are making some changes to the proposed deadlines. Specifically, we are adopting a Schedule 13D amendment filing deadline of two business days[359] after the date of a material change and a Schedule 13G amendment filing deadline of 45 days after calendar quarter-end. We also are amending Rule 13d-2(b) to require an amendment to a Schedule 13G be filed only if a "material change" occurs.

As noted above, Rule 13d-2(a) currently requires that an amendment be filed promptly if a material change occurs in the facts set forth in a Schedule 13D. Although the Commission proposed to amend Rule 13d-2(a) to replace the "promptly" standard with a one-business day deadline, we are instead adopting a two-business day deadline in light of the comments received. As noted in the Proposing Release, establishing a specified filing deadline for Schedule 13D

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356 *See, e.g.*, letters from ABA; IAA; ICI I; STB. Several of those commenters requested that the Commission confirm that a change in beneficial ownership of less than 5% will not be deemed "material" for purposes of the rule. *See* letters from IAA; ICI I; STB. Further, one of those commenters recommended that the Commission clarify whether a Schedule 13G amendment obligation would be triggered based on actual trading activity of an investor or whether such obligation could be triggered based on changes in the number of outstanding shares. *See* letter from STB. The commenter also requested clarification as to whether an investor would be permitted to "net" purchases and sales for purposes of the analysis. *Id*.

357 *See* letter from TIAA.

358 *See* letter from IAA.

359 *See supra* note 134 for a discussion of the new definition of "business day" that we are adopting for purposes of Regulation 13D-G.

amendments should remove any uncertainty as to the date on which an amendment is due and help ensure that beneficial owners amend their filings in a more uniform and consistent manner.[360] We note, however, that several commenters disagreed with the Commission's expectation that the proposed one-business day deadline would impose minimal incremental burdens on Schedule 13D filers.[361] To the contrary, those commenters expressed concerns about the workability of a one-business day deadline for filing Schedule 13D amendments and described the burdens that beneficial owners would incur trying to meet that deadline.[362]

We believe that shifting from the proposed one-business day deadline to a two-business day deadline will address those concerns and provide beneficial owners with adequate time to prepare and file a Schedule 13D amendment. Relevantly, several commenters, including some that generally opposed the proposed amendment, recommended that the Commission adopt a two-business day deadline under Rule 13d-2(a).[363] We agree with those commenters that a two-business day deadline, as compared to a one-business day deadline, would be less onerous for beneficial owners while at the same time ensuring that investors and markets are provided with material information disclosed in Schedule 13D amendments in a sufficiently prompt manner.

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360 Proposing Release at 13857; *see also* letter from EIM I (stating that replacing the "promptly" standard with a two-business day deadline would "provid[e] a more objective deadline"). For that reason, we also disagree with commenters who recommended we should retain a flexible standard. *See supra* notes 333-334 and accompanying text. We note that those recommendations were made, in part, in response to the proposed one-business day deadline. *See, e.g.*, *supra* note 334 (describing some commenters' assertion that a one-business day deadline may not be appropriate for Schedule 13D amendments with respect to material changes that do not have any nexus to a change or influence in corporate control). As such, the additional time provided by the two-business day deadline we are adopting should address some of these concerns. This view is consistent with several commenters' assertions that "promptly" is generally understood to mean two business days. *See supra* note 348.

361 *Id*. (expressing the Commission's belief "that requiring Schedule 13D amendments to be filed within one business day after the date on which a material change occurs will [not] place those filers at a disadvantage" and noting that "those amendments should present a lower administrative burden than the initial Schedule 13D filing").

362 *See supra* notes 317-322 and accompanying text.

363 *See supra* note 348 and accompanying text.

We also believe that giving beneficial owners additional time, as compared to the proposed deadline, to prepare their Schedule 13D amendments will reduce the risk of erroneous or incomplete filings, addressing a concern that some commenters expressed with respect to the proposed one-business day deadline and helping to preserve the utility of those filings.[364]

Further, as discussed above, Rule 13d-2(b) currently requires that an amendment be filed within 45 days of calendar year-end if there were any changes to the information previously reported on Schedule 13G during that year. Similar to our amendments to the initial Schedule 13G filing deadlines under Rules 13d-1(b) and (d), we are revising Rule 13d-2(b) to require that a Schedule 13G amendment pursuant to that rule be filed within 45 days after calendar quarter-end if, during that quarter, there were any material changes to the information previously reported (rather than five business days after the end of the month in which a material change occurred, as proposed). Thus, there are two components to our amendment to Rule 13d-2(b): we are both shortening the deadline for the filing of a Schedule 13G amendment and adding an express qualifier to require an amendment only if there is a *material* change to the information previously reported.

We believe that accelerating the Schedule 13G amendment deadline will help ensure the information reported is timely and useful.[365] Numerous supporting commenters also echoed this point.[366] We note, however, that several commenters asserted that the proposed month-end-based deadline would be unduly burdensome for Schedule 13G filers and that such burdens are not sufficiently mitigated by any technological advancements to justify adopting the proposed

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364 *See supra* notes 323-326 and accompanying text.

365 Proposing Release at 13857.

366 *See supra* note 308 and accompanying text.

deadline,[367] reiterating many of the concerns that were expressed about the proposed amendments to Rules 13d-1(b) and (d).[368]

To mitigate those concerns, and to conform to the initial Schedule 13G filing deadlines applicable to QIIs and Exempt Investors under Rules 13d-1(b) and (d),[369] we are instead adopting a quarter-end-based deadline for Schedule 13G amendments under Rule 13d-2(b). This change from the proposal comports with the recommendations that several commenters that opposed the proposed amendment to Rule 13d-2(b) made to the Commission.[370] Consistent with the comments provided on the proposed amendments to Rules 13d-1(b) and (d), we note that those commenters that suggested a quarter-end-based Schedule 13G amendment deadline recommended various different numbers of days after quarter-end for the deadline.[371] Taking into consideration those various recommendations, as we noted in the context of our amendments to Rules 13d-1(b) and (d),[372] we believe that 45 days is the appropriate length of time because it aligns with the filing deadline for Form 13F, and many institutional investment managers who file a Schedule 13G are already reviewing and assessing their holdings on a quarterly basis in order to prepare Form 13F filings. In addition, although most of the other amended Schedule 13D and 13G filing deadlines will be expressed in "business days," we believe the potential

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367 *See supra* notes 314-316, 338-342 and accompanying text.

368 *See supra* Section II.A.2.

369 We believe that aligning the Schedule 13G amendment deadline under Rule 13d-2(b) with the new quarter-end Schedule 13G filing deadlines for Exempt Investors and QIIs under Rules 13d-1(b) and (2) will promote compliance with those rules, as it preserves the uniformity currently in effect with respect to the year-end filing deadlines under those rules.

370 *See supra* notes 352-353 and accompanying text.

371 *See* letters from Dodge & Cox (recommending a filing deadline of 45 days after quarter-end); IAA (same); ICI I (same); SSC (recommending a filing deadline of 20 business days for QIIs after quarter-end).

372 *See supra* Section II.A.2.c.

compliance benefits of aligning the Schedule 13G amendment deadline with the Form 13F filing deadline justify using calendar days rather than business days.[373]

Even for those Schedule 13G filers that are not Form 13F filers, the 45-day period after calendar quarter-end deadline will be familiar given that they currently must file their Schedule 13G amendment 45 days after calendar year-end.[374] As such, we believe that many of those beneficial owners are well-positioned to submit their Schedule 13G filings 45 days after calendar quarter-end, and we expect that this change from the proposal will produce the same benefits and mitigate opposing commenters' concerns to the same degree as our amendments to Rules 13d-1(b) and (d).[375]

Finally, we also are revising the text of Rule 13d-2(b), as proposed, to substitute the term "material" in place of the term "any" to serve as the standard for determining the type of change that will trigger an amendment obligation under Rule 13d-2(b). As discussed in the Proposing Release, this change is merely intended to codify the Commission's previously stated view that there is an inherent materiality standard in the provisions governing Schedule 13G filings.[376] We note that several commenters requested that the Commission clarify what constitutes a "material

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373 *See* letter from IAA (recommending that the Commission express deadlines consistently in either calendar days or business days across all of the Schedule 13D and 13G initial and amendment filing deadlines, where the deadlines are less than 45 days to promote compliance by making it simpler and less confusing to keep track of the various deadlines).

374 In addition, the amended deadline may result in the same amount of time to file as under the current rules, depending on the quarter in which the filing obligation is triggered. That is, if a material change occurs to the information previously reported on Schedule 13G between Oct. 1 (the beginning of the fourth calendar quarter) and Dec. 31 (both calendar year-end and the end of the fourth calendar quarter), then the filer would have the same amount of time to prepare and submit their Schedule 13G amendment under both the current and amended Rule 13d-2(b).

375 *Id.* See *supra* note 273 for a discussion of why we believe that it is appropriate to accelerate the Schedule 13G filing deadlines, notwithstanding some commenters' assertion that the Commission did not substantiate its concerns regarding Schedule 13G reporting gaps and QIIs selling down positions before the end of a reporting period to avoid a Schedule 13G filing. *See supra* note 339 and accompanying text.

376 *See* Proposing Release at 13858; *see also supra* note 306 and accompanying text.

change," with some of those commenters recommending that the Commission deem a change in beneficial ownership of less than five percent to not be "material" for purposes of Rule 13d-2(b).[377] The term "material," however, already is defined in Rule 12b-2[378] and is a familiar, established concept in the Federal securities laws.[379] As such, we do not believe it is necessary or advisable to adopt a new materiality standard for purposes of Schedule 13G amendments under Rule 13d-2(b) or to provide an express safe harbor from the application of Rule 13d-2(b) for certain specified *de minimis* changes in beneficial ownership.

We recognize that Rule 13d-2(a) provides that a "material change" for purposes of that rule includes "any material increase or decrease in the percentage of the class beneficially owned" and provides that "[a]n acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material' for purposes of this section."[380] We also note, however, that these are non-exclusive circumstances in which an amendment obligation has been triggered.[381] Thus, although this language in Rule 13d-2(a) provides guidance for beneficial owners to determine when a Schedule 13D amendment obligation arises under that rule, it is fundamentally different from the express safe harbor that

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377 *See supra* note 356 and accompanying text.

378 17 CFR 240.12b-2 (stating that the term "material," when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to buy or sell the securities registered).

379 *See, e.g.*, *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (noting that the U.S. Supreme Court "explicitly has defined a standard of materiality under the securities laws" to mean that "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

380 17 CFR 240.13d-2(a).

381 *Id.* (providing that a material change includes, "but [is] not limited to," a "material increase or decrease in the percentage of the class beneficially owned" and that "acquisitions or dispositions of less than [one percent of the class of securities] may be material, depending upon the facts and circumstances").

some commenters requested with respect to the Schedule 13G amendment obligation under Rule 13d-2(b). Further, because both Rule 13d-2(a) and (b) will now share the same materiality standard for determining when an amendment is due, the language in Rule 13d-2(a), including the statement that "[a]n acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed 'material,'" is equally instructive for purposes of determining what changes are material under Rule 13d-2(b).

4. Rules 13d-2(c) and (d)

Rule 13d-2(c) governs the amendment obligation for QIIs whose beneficial ownership exceeds 10 percent of a covered class. Under Rule 13d-2(c), QIIs are required to file an amendment to their Schedule 13G within 10 days after the end of the first month in which their beneficial ownership exceeds 10 percent of a covered class, calculated as of the last day of the month. Once across the 10 percent threshold, QIIs are further required under current Rule 13d-2(c) to file additional amendments within 10 days after the end of the first month in which their beneficial ownership increases or decreases by more than five percent of the covered class, calculated as of the last day of the month.

Rule 13d-2(d) governs the amendment obligation for Passive Investors whose beneficial ownership exceeds 10 percent of a covered class. Under current Rule 13d-2(d), Passive Investors are required to "promptly" file an amendment to their Schedule 13G upon acquiring greater than 10 percent of a covered class. Once across the 10 percent threshold, Passive Investors are further required under current Rule 13d-2(d) to file additional amendments "promptly" if their beneficial ownership increases or decreases by more than five percent of the covered class.

The amendment obligations arising under Rules 13d-2(c) and (d) are in addition to the general amendment requirement in Rule 13d-2(b), which is discussed in more detail in Section

II.3 above. To comply with Rules 13d-2(c) and (d), QIIs and Passive Investors, depending on their beneficial ownership levels, may have to amend their Schedule 13G filings more frequently and do so throughout the year.

a. Proposed Amendments

In connection with the proposed amendment to Rule 13d-2(b),[382] the Commission proposed to amend Rule 13d-2(c) to require that QIIs file an amendment to their Schedule 13G within five days after the date on which their beneficial ownership exceeds 10 percent of a covered class, rather than 10 days after the end of the month. Similarly, once across the 10 percent threshold, the proposed amendment would have required QIIs to file additional amendments five days after the date on which their beneficial ownership increases or decreases by more than five percent of the covered class, rather than 10 days after the end of the month. The Commission intended that these amendments, when considered in the context of the proposed amendment to Rule 13d-2(b), would preserve the utility of Rule 13d-2(c) as a provision that provides the market with earlier notice of QIIs' beneficial ownership exceeding 10 percent of a covered class and, thereafter, upon their beneficial ownership of the covered class increasing or decreasing by more than five percent.[383] The Commission also expressed the view that the imposition of such an accelerated deadline is appropriate in the context of our proposed amendment to Rule 13d-2(c) because the high thresholds in that rule—10 percent beneficial ownership of a covered class and any subsequent five percent increase or decrease in beneficial ownership—warranted that the amendment be rapidly disseminated to the market.[384] And,

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382 *See supra* Section II.A.3.a.

383 Proposing Release at 13858.

384 *Id*.

consistent with its rationale for proposing to shorten the other deadlines, the Commission noted that QIIs may have access to the same technology as other Schedule 13D and 13G filers to satisfy this deadline, especially given the size and sophistication of the persons eligible to file as QIIs.[385]

The Commission also proposed to amend Rule 13d-2(d) to change the amendment filing deadline from the "promptly" standard to one business day after the date on which an amendment obligation arises. The Commission proposed this amendment for substantially the same reasons it proposed to shorten the filing deadline for the initial Schedule 13G[386] and change the filing deadline for Schedule 13D amendments.[387]

b. Comments Received

Commenters expressed a variety of views regarding the proposed amendments to Rules 13d-2(c) and (d). A number of commenters supported the proposed amendments.[388] Some of those commenters supported the proposed amendments for many of the same reasons they supported the revising the other Schedule 13D and 13G filing deadlines.[389]

Some supporting commenters also expressed their expectation that the proposed amendments to Rules 13d-2(c) and (d) would not impose significant costs to beneficial owners of more than five percent of a covered class.[390] One commenter asserted that the proposed

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385 *Id*.

386 *See supra* Section II.A.2.a.

387 *See supra* Section II.A.3.a.

388 *See, e.g.*, letters from AFREF (expressly supporting only the proposed amendment to Rule 13d-2(d)); Anonymous 3; Anonymous 5; Anonymous 11; Anonymous 12; Anthony R.; C. Robinson; Engineer; FedEx; Freeport-McMoRan; HMA I; J. Pieper; J. Soucie; Jonah; Juan; Mark C.; Mike; Nasdaq; P. Worts; Todd.

389 *See supra* notes 38-40, 43-44 and accompanying text; *see also supra* notes 211, 308 and accompanying text.

390 *See, e.g.*, letters from Anonymous 11; Freeport-McMoRan; J. Soucie.

amendments would be consistent in balancing the need for adequate disclosures to investors with burdens placed on filers to accurately prepare required disclosures.[391] This commenter also supported the proposed amendments based on changes in technology and developments in the financial markets.[392]

Several commenters opposed the proposed amendments to Rules 13d-2(c) and (d).[393] Some of those commenters opposed the proposed amendments for many of the same reasons they opposed revising the other Schedule 13D and 13G filing deadlines.[394]

In addition, some commenters also expressed concern that the proposed amendment to Rule 13d-2(c) would impose significant and unnecessary additional reporting burdens on QIIs, including costs related to enhancing their systems to comply with potential intra-month reporting.[395] Another commenter asserted that retaining the current Schedule 13G amendment filing deadline under Rule 13d-2(c) would be consistent with the Commission's historical recognition that beneficial ownership by QIIs does not raise the same concerns as beneficial ownership by investors that hold positions with a control intent and, therefore, it is appropriate to minimize the reporting burdens on QIIs.[396]

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391 *See* letter from FedEx.

392 *See id*.

393 *See, e.g.*, letters from A. Day; ABA; AIMA; B. Mason; Dodge & Cox; EEI (opposing only the proposed amendment to Rule 13d-2(d)); ICI I; MFA; MSBA (same); Perkins Coie; SSC (opposing only the proposed amendment to Rule 13d-2(c)); TIAA (same).

394 *See supra* notes 99, 101-102, 226, 236, 243, 247, 250, 327 and accompanying text.

395 *See, e.g.*, letters from ABA; ICI I; MFA. One commenter noted that proposed amendment represents a radical change for QIIs as it will require them to shift from monitoring and reporting Schedule 13G positions on a monthly basis to a daily basis. *See* letter from MFA. The commenter also stated that the proposed amendment would be particularly burdensome for algorithmic traders whose investments are in a perpetual state of flux. *Id*.

396 *See* letter from ICI I.

With respect to the proposed amendment to Rule 13d-2(d), one commenter asserted that the proposed one business day deadline is unreasonable given that many Passive Investors require assistance of counsel and that a filing under that rule may require input by multiple parties before being filed.[397] One commenter stated that the proposed amendment would compromise the accuracy of Schedule 13G amendments and also would not allow for the possibility that a necessary approver or signer may not be available.[398]

Commenters also criticized the Commission's justifications for the proposed amendments to Rules 13d-2(c) and (d). For example, several commenters disagreed with the Commission's technological advancement-based justifications for the proposed amendments,[399] some of whom raised many of the same concerns that they expressed with respect to the proposed amendments to the other Schedule 13D and 13G filing deadlines.[400] One commenter also noted that Passive Investors generally do not have access to specialized technology that would make it practical for them to file an amended Schedule 13G on the proposed accelerated basis.[401] And, some commenters asserted that the costs of the proposed amendments to Rules 13d-2(c) and (d) would exceed their benefits.[402]

Commenters also made some recommendations regarding the proposed amendments. For example, one commenter that generally opposed the proposed amendment to Rule 13d-2(c) recommended that the Commission require that Schedule 13G amendments pursuant to that rule

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397 *See* letter from MSBA.

398 *See* letter from EEI.

399 *See, e.g.*, letters from Dodge & Cox; IAA; ICI I; MSBA.

400 *See supra* notes 92-94, 220, 223 and accompanying text.

401 *See* letter from MSBA.

402 *See* letters from ABA; MFA. One commenter stated that because QIIs do not have any control intent, the timing of their beneficial ownership reporting is not a source of meaningful concern. *See* letter from ABA.

be filed within 45 days after the end of a quarter, consistent with the amendment frequency for Form 13F.[403]

Some commenters that opposed the proposed amendment to Rule 13d-2(d) recommended a two-business day deadline under that rule,[404] with one commenter asserting that such a deadline would be less onerous for investors yet would ensure the accuracy and transparency of the information in their filings.[405] One such commenter expressed the view that the Commission should require that Schedule 13G amendments under Rule 13d-2(d) be filed promptly, but within no more than some period of time (*e.g.*, between two and four business days).[406] Another opposing commenter suggested that the Commission require that Schedule 13G amendments pursuant to Rule 13d-2(d) be filed within 10 business days because Passive Investors "lack control intent and certify to that effect."[407]

c. Final Amendments

We are amending Rules 13d-2(c) and (d) to revise the Schedule 13G amendment filing deadlines under those rules. In response to commenter concerns, however, we are making some changes from the proposed deadlines. Specifically, we are adopting a filing deadline of five business days[408] after the end of the first month in which an amendment obligation is triggered

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403 *See* letter from IAA.

404 *See* letters from EEI; Perkins Coie.

405 *See* letter from EEI.

406 *See* letter from ABA.

407 *See* letter from IAA. The commenter further noted that "Passive Investors (and QIIs) who lose eligibility to file on Schedule 13G – for example, by changing to a control intent – currently have 10 calendar days . . . to file their initial Schedule 13D reflecting this change in intent" and that "[i]t seems inconsistent with the materiality of the information disclosed to require Passive Investors who remain passive to file a Schedule 13G amendment in a shorter timeline than formerly-Passive Investors who have to file a Schedule 13D." *Id*.

408 *See supra* note 134 for a discussion of the new definition of "business day" that we are adopting for purposes of Regulation 13D-G.

under Rule 13d-2(c) and two business days after the date on which an amendment obligation is triggered under Rule 13d-2(d).

As noted above, Rule 13d-2(c) currently requires QIIs to file a Schedule 13G amendment within 10 days after the end of the first month in which their beneficial ownership exceeds 10 percent of a covered class and, once across the 10 percent threshold, within 10 days after the first month in which their beneficial ownership increases or decreases by more than five percent. Although the Commission proposed to revise Rule 13d-2(c) to shorten the filing deadline to five days after the date on which an amendment obligation arises under that rule, we are instead retaining the month-end-based filing deadline and shortening that deadline from 10 days after month-end to five business days after month-end. The Commission based its proposed deadline under Rule 13d-2(c), in large part, on the proposal to shorten the Schedule 13G amendment deadline under Rule 13d-2(b) from a calendar year-end-based deadline to a month-end-based deadline.[409] Therefore, if we had adopted the Commission's proposed amendment to Rule 13d-2(b), then Rule 13d-2(c), in its current form—which as noted above requires that QIIs file a Schedule 13G amendment within 10 days after the end of the first month in which the triggering event occurs—would not be of any value.

As discussed above, however, we did not adopt the Commission's proposed month-end-based deadline under Rule 13d-2(b).[410] Instead, we revised Rule 13d-2(b) to require that a Schedule 13G amendment be filed within 45 days after the end of a calendar quarter in which a material change occurs to the information previously reported. Because Rule 13d-2(b) will have

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409 *See* Proposing Release at 13858 (stating that the proposed amendments to Rule 13d-2(c), "when considered in the context of our proposed amendment to Rule 13d-2(b), preserve the utility of Rule 13d-2(c) as a provision that provides the market with earlier notice of" significant changes in QIIs' beneficial ownership).

410 *See supra* Section II.A.3.c.

a quarter-end-based filing deadline, the month-end-based deadline in Rule 13d-2(c) will continue to have utility as a provision that provides the market with earlier notice of QIIs' beneficial ownership exceeding 10 percent of a covered class and, thereafter, upon their beneficial ownership increasing or decreasing by more than five percent. In addition, we expect that retaining the month-end-based deadline in Rule 13d-2(c) will address the concerns that several commenters expressed about the burdens that the proposed amendment would impose on QIIs.[411]

Notwithstanding those commenters' concerns, we believe it is appropriate to accelerate the filing deadline in Rule 13d-2(c) in order for investors to receive material information in a timely manner in light of the technological advancements and other developments in the financial markets[412] in the more than 40 years since the 10-day deadline was adopted.[413] As such, we are shortening Rule 13d-2(c)'s filing deadline from 10 days after month-end to five business days after month-end. Because the deadline is being expressed in "business days" instead of "days,"[414] and given the size and sophistication of the persons eligible to file as QIIs, we do not expect that this new filing deadline under Rule 13d-2(c) will be unduly burdensome.

In addition, as discussed above, Rule 13d-2(d) currently requires that Passive Investors file a Schedule 13G amendment promptly upon acquiring beneficial ownership of more than 10 percent of a covered class and, once across the 10 percent threshold, promptly upon increasing or decreasing their beneficial ownership by more than five percent. As with the Schedule 13D

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411 *See supra* notes 394-396 and accompanying text.

412 *See supra* notes 138-144 and accompanying text for some examples of those advancements and developments.

413 *See* Filing and Disclosure Release (adopting the predecessor to current Rule 13d-2(c)).

414 The five-business day deadline after month-end, as compared to a hypothetical five-calendar day deadline, will give beneficial owners additional time before their Schedule 13G amendment is due if the filing period encompasses days that are not business days (*i.e.*, Saturday, Sunday, or a Federal holiday).

amendment deadline under Rule 13d-2(a), the Commission proposed to change the deadline under Rule 13d-2(d) from the "promptly" standard to one business day.[415] For the same reasons that we changed the filing deadline for Schedule 13D amendments to two business days,[416] and to retain the historical consistency with that deadline, we also are amending Rule 13d-2(d) to change the amendment filing deadline from the current "promptly" standard to two business days after the date on which an amendment obligation arises.

5. Rules 13(a)(4) and 201(a) of Regulation S-T

Regulation 13D-G states that Schedules 13D and 13G should be prepared in accordance with Regulation S-T, which governs the preparation and submission of documents filed electronically on the Commission's EDGAR system.[417] In accordance with 17 CFR 232.12, electronic filings may be submitted to the Commission Monday through Friday, except Federal holidays, from 6 a.m. to 10 p.m. eastern time.[418] Under Rule 13(a) of Regulation S-T, however, most filings must be submitted by direct transmission commencing on or before 5:30 p.m. eastern time in order to be deemed filed on the same business day.[419] Most filings submitted by direct transmission commencing after 5:30 p.m. will be deemed filed as of the next business day.[420] Rule 13(a)(4) of Regulation S-T, however, sets forth certain exceptions from that 5:30 p.m. "cut-off" time. Specifically, it provides that certain filings—namely, Forms 3, 4 and 5, Form 144, and Schedule 14N—"submitted by direct transmission on or before 10 p.m. [eastern

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415 *See* Proposing Release at 13858.

416 *See supra* Section II.A.3.c.

417 The preamble to Regulation 13D-G states, in relevant part, that "[t]his regulation should be read in conjunction with Regulation S-T (part 323 of this chapter), which governs the preparation and submission of documents in electronic format" (all capitalized letters in the original).

418 17 CFR 232.12(c).

419 *See* 17 CFR 232.13(a)(2).

420 *Id.*

time] shall be deemed filed on the same business day."[421] Rule 13(a)(4), therefore, effectively extends the "cut-off" time for these filings from 5:30 p.m. to 10 p.m.

In addition, Rule 201 of Regulation S-T and 17 CFR 232.202 ("Rule 202 of Regulation S-T") address hardship exemptions from EDGAR filing requirements, and Rule 13(b) of Regulation S-T addresses the related issue of filing date adjustments. A filer may obtain a temporary hardship exemption under current Rule 201 of Regulation S-T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing by submitting a properly formatted paper copy of the filing under cover of Form TH.[422] Alternatively, instead of pursuing a hardship exemption, a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T. That rule addresses circumstances in which a filer attempts in good faith to file a document with the Commission in a timely manner, but the filing is delayed due to technical difficulties beyond the filer's control.[423] In those instances, the filer may request a filing date adjustment.[424] The staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors.[425]

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13(a)(4) of Regulation S-T to provide that any Schedule 13D or Schedule 13G, including any amendments thereto, submitted by direct transmission on or before 10 p.m. eastern time on a given business

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421 17 CFR 232.13(a)(4). Rule 13(a)(3) also provides the same accommodation for registration statements or any post-effective amendment thereto filed pursuant to Rule 462(b). *See* 17 CFR 232.13(a)(3).

422 17 CFR 232.201(a).

423 17 CFR 232.13(b).

424 *Id.*

425 *Id.*

day will be deemed filed on the same business day.[426] Conversely, under the proposed amendment, any Schedule 13D or 13G filing not submitted by direct transmission by 10 p.m. on its due date will be assigned a filing date of the next business day, and for purposes of compliance with the applicable reporting requirements, would be considered late. The Commission proposed this extension of the "cut-off" time to ease filers' administrative burdens in connection with the proposed accelerated filing deadlines for Schedule 13D and 13G filings, including those filers located in different time zones.[427]

The Commission also proposed to amend Rule 201(a) of Regulation S-T to remove a Schedule 13D or 13G filer's ability to rely on a temporary hardship exemption under that rule. The Commission noted that this proposal would be consistent with the treatment of Forms 3, 4, and 5, which have a 10 p.m. "cut-off" time under Rule 13(a)(4) of Regulation S-T and are ineligible for a temporary hardship exemption under Rule 201(a) of Regulation S-T.[428] The Commission also based this proposal on the following factors: the relative ease of using the EDGAR on-line filing system; the proposed extended 10 p.m. eastern time filing deadline; the limited value to the public of paper filings; and the availability of a filing date adjustment under the same circumstances as a temporary hardship exemption would have been available but for the proposed amendment.[429]

b. Comments Received

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426 Notwithstanding the proposed extension of the time period in which accepted Schedule 13D and 13G filings may be made and still be considered timely, the Commission stated that filer support hours would not be extended. Proposing Release at 13859, n.82. Thus, filer support would continue to remain available only until 5:30 p.m. eastern time as is currently the case.

427 Proposing Release at 13859.

428 *Id*.

429 *Id*. at 13859-60.

Commenters largely supported the proposed amendments to Rules 13(a)(4) and 201(a) of Regulation S-T,[430] with only one commenter expressly opposing the proposed amendment to Rule 201(a) of Regulation S-T.[431] One of the supporting commenters asserted that additional time to file would be critical under the Commission's proposed acceleration of the Schedule 13D and 13G filing deadlines.[432] Another supporting commenter noted that the proposed amendment to Rule 13(a)(4) would conform to the Section 16 filing deadlines and help ease the compliance burdens of shortened filing deadlines and time zone differences.[433]

Some commenters also made recommendations in connection with the proposed amendments to Rules 13(a)(4) and 201(a) of Regulation S-T. One supporting commenter recommended that the Commission extend filer support hours beyond 6 p.m. eastern time.[434] Another commenter, which neither clearly supported nor opposed the proposed amendment to Rule 201(a), stated that it would not object to making a temporary hardship exemption unavailable to Schedules 13D and 13G filers as long as a filer may request a filing date adjustment under Rule 13(b) of Regulation S-T if it experiences unanticipated technical difficulties that prevent the timely submission of an electronic filing.[435]

c. Final Amendments

We are amending Rules 13(a)(4) and 201(a) of Regulation S-T as proposed. Thus, the filing "cut-off" time for Schedules 13D and 13G under Rule 13(a)(4) of Regulation S-T will be

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430 *See* letters from EIM I (supporting only the proposed amendment to Rule 13(a)(4)); Engineer; Hoak (same); IAA (same); ICI I.

431 *See* letter from EIM I.

432 *See* letter from ICI I.

433 *See* letter from IAA.

434 *See* letter from ICI I.

435 *See* letter from IAA.

extended from 5:30 p.m. to 10 p.m. eastern time. In addition, the temporary hardship exemption under Rule 201(a) of Regulation S-T will be made unavailable for Schedule 13D and 13G filers. Schedule 13D and 13G filers will, however, remain eligible to request a filing date adjustment under Rule 13(b) of Regulation S-T.[436]

We are adopting these amendments as proposed for the same reasons the Commission discussed in the Proposing Release,[437] which were largely supported by the commenters.[438] We note that a commenter also requested that we extend filer support hours beyond 6 p.m. eastern time.[439] As the Commission noted in the Proposing Release, however, the amendment to Rule 13(a)(4) of Regulation S-T mirrors the existing filing "cut-off" time for Forms 3, 4, and 5.[440] In extending the filing "cut-off" time for those forms, the Commission declined to extend filer support hours.[441] We also decline to do so here in light of the relative ease of using the EDGAR on-line filing system, the extension of the "cut-off" time by four and a half hours, and the availability of a filing date adjustment if the filer experiences unanticipated technical difficulties

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436 One commenter requested that we allow Schedule 13D and 13G filers to request a filing date adjustment under Rule 13(b) of Regulation S-T if they experience unanticipated technical difficulties. *See supra* note 435 and accompanying text. For example, as noted above and consistent with the Commission's statement in the Proposing Release, "[f]iling date adjustments may . . . be made if a filer is unable to submit its Schedule 13D or 13G as a result of an EDGAR outage . . . under Rule 13(b) of Regulation S-T on the grounds that such outage constitutes technical difficulties beyond the filer's control." Proposing Release at 13860, n.84.

437 *See* Proposing Release at 13859-60 ("We are proposing to amend Rule 201(a) of Regulation S–T to make temporary hardship exemptions unavailable to filers of Schedules 13D and 13G because of: The relative ease of using the EDGAR on-line filing system; the proposed extended 10 p.m. eastern time filing deadline; the limited value to the public of paper filings; and the availability of a filing date adjustment under the same circumstances as a temporary hardship exemption would have been available but for the proposed amendment."); *see also supra* Section II.A.5.a.

438 *See supra* Section II.A.5.b.

439 *See supra* note 434 and accompanying text.

440 Proposing Release at 13859, n.82.

441 *See Mandated Electronic Filing and Website Posting for Forms 3, 4 and 5*, Release No. 34-47809 (May 7, 2003) [68 FR 25788 at 25793 (May 13, 2003)] ("[W]e have amended Rule 13(a) to provide that any Form 3, 4 or 5 submitted by direct transmission on or before 10 p.m. Eastern time is deemed filed on the same business day. However, filer support hours will not be correspondingly extended . . . .").

as previously described.

B. Proposed Amendment to Rule 13d-3 Regarding the Use of Cash-Settled Derivative Securities

Neither Section 3(a) nor Section 13(d) of the Exchange Act defines the term "beneficial owner" or "beneficial ownership." Regulation 13D-G similarly does not expressly define those terms. To provide clarity, the Commission adopted Rule 13d-3, which provides standards for the purpose of determining whether a person is a beneficial owner subject to Section 13(d) and Section 13(g).[442] Over the years, some observers have raised concerns about the ability of investors in cash-settled derivative securities to influence or control an issuer by, for example, pressuring a counterparty to the derivative transaction to make certain decisions regarding the voting and disposition of substantial blocks of securities of the reference issuer.[443] To address these and related concerns,[444] the Commission proposed new Rule 13d-3(e).

1. Proposed Amendment

The Commission proposed to add new paragraph (e) to Rule 13d-3 to deem certain holders of cash-settled derivative securities, other than SBS, to be the beneficial owners of the

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442 *Adoption of Beneficial Ownership Disclosure Requirements*, Release No. 34-13291 (Feb. 24, 1977) [42 FR 12342 (Mar. 3, 1977)]. The Commission emphasized that "[a]n analysis of all relevant facts and circumstances in a particular situation is essential in order to identify each person possessing the requisite voting power or investment power." *Id.* at 12344.

443 *See, e.g.*, Maria Lucia Passador, *The Woeful Inadequacy of Section 13(d): Time for a Paradigm Shift?*, 13 VA. L. & BUS. REV. 279, 296-99 (2019) ("[I]n the recent past, cash-settled equity derivatives—mainly call and security-based options—were frequently used not only with a speculative and hedging purpose, but also with the immediate, explicit, and specific aim of silently accumulating a leading (or even control) position in public companies."); Wachtell Petition, *supra* note139, at 8 ("Even in the absence of voting or dispositive power, participants in large hedging transactions gain influence in a number of ways. . . . [V]oting of the shares may be subject to counterparty influence or control, either directly or because the counterparty is motivated to vote the hedged shares in a way that will please the investor and induce them to continue to transact with such counterparty. . . . Even those derivatives that are characterized as 'cash-settled' may ultimately be settled in kind, creating further market pressure as the participants need to acquire shares for such settlement.").

444 Proposing Release at 13861.

reference covered class. Proposed Rule 13d-3(e)(1) would have treated a holder of a cash-settled derivative security, excluding SBS, as the beneficial owner of the equity securities in the covered class referenced by the cash-settled derivative security if such person held the cash-settled derivative security with the purpose or effect of changing or influencing the control of the issuer of the class of equity securities, or in connection with or as a participant in any transaction having that purpose or effect.[445] The Commission included this control-based standard in proposed Rule 13d-3(e) to ease the administrative burdens associated with the application of this proposed provision by employing a familiar standard under Regulation 13D-G.[446] In addition, proposed Rule 13d-3(e) would have set forth the formula for calculating the number of equity securities that a holder of a cash-settled derivative security would be deemed to beneficially own.[447]

In proposing Rule 13d-3(e), the Commission noted that non-SBS cash-settled derivative securities held with the purpose or effect of changing or influencing control of the issuer may be used to influence the voting, acquisition, or disposition of any shares the holder's counterparty may have acquired in a hedge, proprietary investment, or otherwise.[448] The Commission also stated that a non-SBS cash-settled derivative holder's probability of success in exerting influence

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445 Proposing Release at 13862. Proposed paragraph (e)(1) also would have included a provision stating that any securities that are not outstanding but are referenced by the relevant cash-settled derivative security would be deemed to be outstanding for the purpose of calculating the percentage of the relevant covered class beneficially owned by the holder of the derivative security. *Id.* at 13862-63. Those reference securities, however, would not have been deemed to be outstanding for the purpose of any other person's calculation of the percentage of the covered class it beneficially owns. *Id*.

446 *Id*. (noting that "the concept 'purpose or effect of changing or influencing the control of the issuer' is a familiar one under Regulation 13D-G, both in the context of determining whether a person is a beneficial owner under Rule 13d-3 and for purposes of determining whether a beneficial owner is eligible to report on Schedule 13G in lieu of Schedule 13D under Rule 13d-1").

447 *See id.* at 13863 (describing that formula and providing illustrative examples of its application). The Commission also proposed three notes to Rule 13d-3(e) that would have clarified the application of the proposed rule's formula. *Id*. at 13863-64.

448 *Id*. at 13862.

or control over the issuer of the reference security may increase given that any voting power the derivative holder held would be magnified by minimizing the number of shares that potentially could be voted against the holder's plans or proposals.[449] Finally, the Commission recognized that holders of non-SBS cash-settled derivative securities may position themselves to acquire any reference securities that the counterparty may acquire to hedge the economic risk of that transaction.[450] The Commission also noted that holders of non-SBS cash-settled derivative securities may present their economic positions to persuade an issuer or its shareholders to engage with them.[451] The Commission concluded, therefore, that these persons' holdings of non-SBS cash-settled derivative securities may implicate the policies underlying Section 13(d).[452]

2. Comments Received

Commenters were divided on proposed Rule 13d-3(e). Many commenters expressed general support for the proposed amendment.[453] A number of these commenters indicated that proposed Rule 13d-3(e) would add needed market transparency.[454] One commenter expressed

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449 *Id*. The Commission acknowledged the possibility that derivative counterparties may have a business relationship to develop and protect, and thus may ultimately cast votes in accordance with the preference of the derivative holder or not vote the shares. *See id*.

450 *Id.*

451 *Id.*

452 *Id.* (citing the Filing and Disclosure Release, which notes that Section 13(d)'s legislative history indicates that the purpose of that section is "to provide information to the public and the affected issuer about rapid accumulations of its equity securities" by "persons who would then have the potential to change or influence control of the issuer.").

453 *See, e.g.*, letters from Andres Loubriel (Feb. 19, 2022) ("A. Loubriel"); AFL-CIO; AFREF; AFREF, et al.; Anonymous (Feb. 25, 2022) ("Anonymous 7"); Better Markets I; Convergence; Dan Pierce (Feb. 20, 2022) ("D. Pierce"); Freeport-McMoRan; FundApps; HMA I; Justin G. (Feb. 19, 2022) ("Justin G."); Labor Unions; Mark C.; NIRI; P. Worts; PL Salvati;Henry T Hu, Allan Shivers Chair in the Law of Banking and Finance at the University of Texas Law School (Apr. 11, 2022) ("Prof. Hu"); Robert Rutkowski (Apr. 12, 2022) ("R. Rutkowski"); Samuel Ryan, Senior Battery Test Engineer, ESS Inc. (Feb. 18, 2022) ("S. Ryan"); SCG; Sen. Baldwin, et al.; T. Reilly; Todd; WLRK I; WLRK II; *see also* Letter Type C.

454 *See, e.g.*, letters from AFL-CIO; AFREF; Better Markets I; Convergence; D. Pierce; FundApps; Justin G.; Labor Unions; NIRI; P. Worts; PL Salvati; Prof. Hu; SCG; WLRK I; WLRK II.

the view that the proposal would mitigate what it described as "hidden risk concentration."[455] Another commenter stated that the proposal would provide "the markets more generally with full information" and allow stockholders to better assess whether to support or oppose activists' proposals.[456] Some commenters asserted that an investment fund used derivatives (reportedly forward purchase contracts) to conceal an economic interest in an issuer that it later converted into a profitable beneficial ownership stake ultimately reported on Schedule 13D.[457]

Opposing commenters, by contrast, raised numerous objections to proposed Rule 13d-3(e).[458] Some of these commenters questioned whether there was a sound basis for the proposal.[459] One commenter asserted that the proposal was not based on empirical analysis or "evidence to establish . . . an actual problem in the marketplace" and is a "solution in search of a problem."[460] Other commenters asserted that holders of cash-settled derivative securities should not be deemed beneficial owners because such derivative securities confer no control or influence over the voting or disposition of the reference equity securities.[461] Some commenters asserted that in actuality, a counterparty would not look to the derivative holder as to whether to

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455 *See* letter from Better Markets I.

456 *See* letter from WLRK II.

457 *See* letters from NIRI; SCG.

458 *See, e.g.*, letters from ABA; AIMA; B. Mason; CIRCA I; CIRCA III; EIM I; IAA; ICI I; ICM; J. Kennedy; MFA; Robert Plesnarski, O'Melveny & Myers LLP (June 27, 2023) ("O'Melveny & Myers"); Perkins Coie; Prof. Gordon; Profs. Bishop and Partnoy I; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; Profs. Eccles and Rajgopal; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; STB; TIAA. We note that several commenters expressed concern that proposed Rule 13d-3(e) would "[a]ssign[] voting rights to derivative holders." *See, e.g.*, letter from Susanne Trimbath, Ph.D., Economist, Author, Retired Professor (June 24, 2023); *see also* Letter Type B; Letter Type D, *available at* https://www.sec.gov/comments/s7-06-22/s70622-typed.htm; Letter Type E, *available at* https://www.sec.gov/comments/s7-06-22/s70622-typee.htm. For avoidance of doubt, we note that neither proposed Rule 13d-3(e) nor any of the other Proposed Amendments, nor any of the final amendments we are adopting, would have that effect.

459 *See* letters from CIRCA I; MFA; Profs. Bishop and Partnoy III; SIFMA; SIFMA AMG.

460 *See* letter from EIM I.

461 *See* letters from ABA; AIMA; CIRCA I; EIM I; IAA; MFA; STB; TIAA.

acquire for hedging purposes, or how to vote and/or dispose of, any securities of the reference class or that doing so would be contrary to market practice and/or standard industry legal documentation.[462] Several opposing commenters asserted that investors in cash-settled derivative securities already may be subject to regulation as beneficial owners under existing Rule 13d-3 in applicable circumstances or that the Commission could proceed via interpretation or other means and without a rule amendment.[463] Similarly, one commenter stated that it may not be necessary to deem investors in cash-settled derivative securities beneficial owners if the Commission is satisfied that derivative counterparties can effectively and irrevocably contract out of the right to convert such derivatives to either physical ownership of underlying shares or any other form of voting rights.[464]

In addition, some opposing commenters expressed concerns regarding proposed Rule 13d-3(e) related to the APA or the Commission's statutory authority to adopt the proposal. For example, some commenters said that the proposal represents an inappropriate expansion of the applicable statutory provisions[465] or would be arbitrary and capricious, if adopted.[466] Further,

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462 *See* letters from ABA; CIRCA I; EIM I; O'Melveny & Myers; SIFMA; SIFMA AMG; STB.

463 *See* letters from AIMA; CIRCA I; EIM I; IAA; ICI I; MFA; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; SIFMA; SIFMA AMG. One commenter expressly recommended that the Commission issue interpretive guidance on this point. *See* letter from Profs. Bishop and Partnoy II; *see also* letter from Profs. Bishop and Partnoy III. Similarly, another commenter suggested that the Commission "publish clarifying guidance explaining that the beneficial ownership determination for all cash-settled derivatives is consistent with the treatment of SBS, as described in the 2011 Release." *See* letter from IAA. The "2011 Release" that the commenter refers to is *Beneficial Ownership Reporting Requirements and Security-Based Swaps*, Release No. 34-64628 (June 8, 2011) [76 FR 34579 (June 14, 2011)], which we henceforth refer to as the "Security-Based Swaps Release."

464 *See* letter from Wm. Robertson Dorsett, Columbia Law School (Feb. 11, 2022).

465 *See* letters from ABA; IAA; MFA; Wm. Robertson Dorsett, Columbia Law School (Apr. 11, 2022). One of these commenters also stated that the proposal would be inconsistent with the Commission's interpretation in the Security-Based Swaps Release. *See* letter from MFA. Another commenter questioned the Commission's authority to adopt proposed Rule 13d-3(e) "when Rule 13d-3(a) and all relevant authority relating to an understanding of beneficial ownership has historically required a showing of control over the voting or the disposition of securities." *See* letter from ABA.

466 *See* letter from EIM I.

one commenter emphasized that "[b]y focusing on speculative harms; failing to engage seriously with the question whether new or different rules were needed to combat them; and failing to consider costs, the Proposed Rule falls short of providing a sound justification for the proposals being made."[467] The commenter stated that "[f]or these reasons, the Commission has not satisfied its obligations under Sections 3(f) and 23(a)(2) of the Exchange Act."[468]

Finally, some opposing commenters discussed other concerns regarding proposed Rule 13d-3(e). Some commenters expressed concern that the proposal would inhibit activist investment strategies.[469] Other commenters expressed concern that the proposed rule, including its "change of control" standard, is overly broad, unclear, and would be difficult to administer.[470] Many commenters indicated that the proposal's computational methodology, including the need to conduct daily calculations, would be complex or increase the compliance burden of the rule.[471] In addition, one commenter noted that the "concept of beneficial ownership is used . . . in many other federal and state laws and rules, as well as in contracts" and, therefore, "expanding the definition of 'beneficial ownership'" as proposed in Rule 13d-3(e) could have "significant unintended consequences."[472] Further, another commenter indicated that the proposed rule's expansion of the scope of the matters that may give rise to beneficial ownership "could result in

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467 *See* letter from SIFMA; *see also* letter from SIFMA & SIFMA AMG.

468 *See* letter from SIFMA. The commenter also recommended that the Proposed Amendments be revised and re-proposed for notice and comment. *See id*.

469 *See* letters from CIRCA I; MFA.

470 *See* letters from ABA; CIRCA I; EIM I; IAA; MFA; Perkins Coie; SIFMA; SIFMA AMG; TIAA; *see also* IAC Recommendations (stating that the proposed rule, together with the Commission's proposed Rule 10B-1, could "cause confusion in the markets and make compliance difficult for market participants" and recommending that the two proposed rules be better aligned).

471 *See* letters from ABA; AIMA; IAA; ICI I; Profs. Bishop and Partnoy I; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; STB; TIAA; *see also* letter from MFA & NAPFM.

472 *See* letter from ICI I.

potential and significant overreporting by [investment] advisers, leading to unfounded inferences from public filings that holders of cash-settled derivatives may have voting and investment power over securities that they do not, in fact, have, nor do they have the right to acquire."[473]

3. Commission Guidance

We are not adopting proposed paragraph (e) to Rule 13d-3 to deem certain holders of cash-settled derivative securities as beneficial owners of the reference covered class. Consistent with the views expressed by several commenters, we have determined that Commission guidance on the applicability of existing Rule 13d-3 to cash-settled derivative securities, similar to the guidance provided in the Security-Based Swaps Release,[474] would provide sufficient clarity.[475]

The Commission explained in the Security-Based Swaps Release the circumstances under which a holder of a SBS may become a beneficial owner as determined under Rule 13d-3. It noted that "our existing regulatory regime may require the reporting of beneficial ownership" in cases in which a SBS (1) "confers voting and/or investment power (or a person otherwise acquires such power based on the purchase or sale of a [SBS])," (2) "is used with the purpose or effect of divesting or preventing the vesting of beneficial ownership as part of a plan or scheme to evade the reporting requirements," or (3) "grants a right to acquire an equity security."[476] Although the determination under Rule 13d-3 as to whether the holder of any cash-settled

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473 *See* letter from IAA; see also letters from MFA and Perkins Coie that expressed similar concerns about excessive beneficial ownership reporting and potential market confusion even though the persons holding cash-settled derivatives ordinarily have mere economic exposure and no power to vote a reference security or influence or change control of an issuer.

474 *See supra* note 463 and accompanying text.

475 *See* letter from IAA; *see also* letter from Profs. Bishop and Partnoy II (stating that, under existing Rule 13d-3, holders of cash-settled derivative securities may be subject to regulation as beneficial owners of the reference equity securities in applicable circumstances, and recommending that the Commission not adopt proposed Rule 13d-3(e) but instead issue "guidance on cash-settled derivatives" and "articulat[e] how the Commission's current rules continue to prohibit problematic conduct related to the [Proposing Release]").

476 Security-Based Swaps Release at 34582.

derivative security is the beneficial owner of the reference covered class ultimately will depend on the relevant facts and circumstances, the above-described reasoning in the Security-Based Swaps Release (the three elements of which correspond to Rule 13d-3(a), (b), and (d)(1), respectively) provides an instructive analytical framework with respect to cash-settled derivative securities.

As is the case with persons holding cash-settled SBS, Rule 13d-3 similarly may be applied to holders of non-SBS cash-settled derivatives[477] to treat those persons as beneficial owners in applicable instances. Although non-SBS derivative securities settled exclusively in cash generally are designed to represent only an economic interest, discrete facts and circumstances could arise where the holder of these securities may have voting or investment power as described in Rule 13d-3(a) or otherwise could be deemed to be a beneficial owner as determined under Rule 13d-3(b) or 13d-3(d), as described below. First, under Rule 13d-3(a), to the extent a non-SBS cash-settled derivative security provides its holder, directly or indirectly, with exclusive or shared voting or investment power, within the meaning of that rule, over the reference covered class through a contractual term of the derivative security or otherwise, the holder of that derivative security may become a beneficial owner of the reference covered class. Second, to the extent a non-SBS cash-settled derivative security is acquired with the purpose or effect of divesting its holder of beneficial ownership of the reference covered class or preventing the vesting of that beneficial ownership as part of a plan or scheme to evade the reporting requirements of Section 13(d) or 13(g), the derivative security may be viewed as a contract, arrangement, or device within the meaning of those terms as used in Rule 13d-3(b). The holder

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477 Some commenters expressed the view that non-SBS cash-settled derivatives only represent an economic interest and that Section 13 generally should not or does not apply to these securities. *See* letters from ABA; IAA; MFA; Perkins Coie.

of such cash-settled derivative security, therefore, may be deemed a beneficial owner under Rule 13d-3(b) in this context. Finally, under Rule 13d-3(d)(1), a person is deemed a beneficial owner of an equity security if the person (1) has a right to acquire beneficial ownership of the equity security within 60 days or (2) acquires the right to acquire beneficial ownership of the equity security with the purpose or effect of changing or influencing the control of the issuer of the security for which the right is exercisable, or in connection with or as a participant in any transaction having such purpose or effect, regardless of when the right is exercisable.[478] As the Commission stated in the Security-Based Swaps Release, Rule 13d-3(d)(1) applies regardless of the origin of the right to acquire the equity security.[479] If such a right originates in a derivative security that is nominally "cash-settled" or from an understanding in connection with that derivative security, Rule 13d-3(d)(1) would apply.

C. Proposed Amendments to Rule 13d-5

In the Proposing Release, the Commission proposed to amend Rule 13d-5 to, among other things:

- Revise Rule 13d-5(b)(1) to remove the potential implication that it sets forth the exclusive legal standard for group formation under Section 13(d)(3) or 13(g)(3);

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478 *See* Rule 13d-3(d)(1)(i). The first prong described above (*i.e.*, the lead-in of Rule 13d-3(d)(1)(i)) applies to any "right to acquire," including but not limited to those enumerated in Rule 13d-3(d)(1)(i)(A) through (D). The second prong described above (*i.e.*, the proviso of Rule 13d-3(d)(1)(i)) applies to any "security or power" specified in Rule 13d-3(d)(1)(i)(A) through (C), thereby excluding Rule 13d-3(d)(1)(i)(D) (namely, "any right to acquire . . . pursuant to the automatic termination of a trust, discretionary account or similar arrangement") from the types of securities or powers that, if held, can result in the holder being deemed a beneficial owner regardless of when the right is exercisable. Thus, the holder of any right to acquire beneficial ownership as described in Rule 13d-3(d)(1)(i)(D) will be subject to being deemed a beneficial owner pursuant to Rule 13d-3(d)(1) if the right creates an entitlement to acquire securities of the underlying covered class within 60 days.

479 Security-Based Swaps Release at 34582.

- Add new paragraph (b)(1)(ii) to specify that if a person, in advance of filing a Schedule 13D, discloses to any other person that such filing will be made and such other person acquires securities in the covered class for which the Schedule 13D will be filed, those persons will have formed a group within the meaning of Section 13(d)(3); and
- Add new paragraph (b)(2)(i) to specify that when two or more persons "act as" a group under Section 13(g)(3) of the Act, the group will be deemed to have become the beneficial owner, for purposes of Section 13(g)(1) and (2) of the Exchange Act, of the beneficial ownership held by its members.

Rather than adopt these amendments, we instead are issuing guidance on the operation of existing Rule 13d-5(b) and Sections 13(d)(3) and 13(g)(3) that clarifies and affirms that, among other matters, two or more persons who "act as" a group for purposes of acquiring, holding, or disposing securities may be treated as a group.

In addition to the foregoing, we are adopting certain amendments to Rule 13d-5 that the Commission included in the Proposing Release. Specifically, we are:

- Adding new paragraph (b)(1)(ii) to specify that a group subject to reporting obligations under Section 13(d) shall be deemed to acquire any additional equity securities acquired by a member of the group after the group's formation;
- Adding new paragraph (b)(1)(iii) to carve out from paragraph (b)(1)(ii) any intra-group transfers of equity securities;
- Adding new paragraph (b)(2)(i) to specify that a group regulated under Section 13(g) shall be deemed to acquire any additional equity securities acquired by a member of the group after the group's formation;

- Adding new paragraph (b)(2)(ii) to carve out from paragraph (b)(2)(i) any intra-group transfers of equity securities;
- Redesignating current Rule 13d-5(b)(1) as Rule 13d-5(b)(1)(i) to accommodate the inclusion of these amendments, but otherwise not altering the substance of that rule; and
- Making other technical changes to Rule 13d-5.[480]

Those amendments, as well as our guidance, are discussed in more detail below.

1. Proposed Rules 13d-5(b)(1)(i), (b)(2)(i), and (b)(1)(ii)

a. Proposed Amendments

In the Proposing Release, the Commission proposed to amend Rule 13d-5 to track the statutory text of Sections 13(d)(3) and (g)(3) and specify that two or more persons who "act as" a group for purposes of acquiring, holding, or disposing of securities are treated as a group.[481] Specifically, the Commission proposed to redesignate Rule 13d-5(b)(1) as Rule 13d-5(b)(1)(i) and revise it to, among other things, remove the reference to an agreement between two or more persons and instead indicate that when two or more persons act as a group under Section 13(d)(3), the group will be deemed to have acquired beneficial ownership of all of the equity securities of a covered class beneficially owned by each of the group's members as of the date on which the group is formed. The Commission also proposed new Rule 13d-5(b)(2)(i), which would contain nearly identical language to proposed Rule 13d-5(b)(1)(i), with conforming changes to address circumstances in which two or more persons act as a group under Section 13(g)(3) and the group is deemed to become the beneficial owner of all of the equity securities of

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480 *See supra* note 22.

481 Proposing Release at 13868-69.

a covered class beneficially owned by each of the group's members as of the date on which the group is formed.

The Commission proposed these amendments, among other things, to (1) make clear that "the determination [under Sections 13(d)(3) and 13(g)(3)] as to whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to constitute the formation of a group," and (2) eliminate any potential for Rule 13d-5(b)(1) to be misconstrued as the definition of a group and consequently used as a basis to narrow the application of Sections 13(d)(3) and 13(g)(3).[482]

In addition, the Commission proposed to amend Rule 13d-5 to include new subsection (b)(1)(ii). The proposed subsection would provide that a person who shares information about an upcoming Schedule 13D filing such person is or will be required to make with respect to a covered class, to the extent this information is not yet public and was communicated with the purpose of causing others to make purchases of securities of the same covered class, and a person who subsequently purchases securities of that class based on this information, will have formed a group within the meaning of Section 13(d)(3).

b. Comments Received

Commenters expressed a wide range of views on proposed Rules 13d-5(b)(1)(i) and

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482 *Id*.

(b)(2)(i).[483] A number of commenters supported the amendments.[484] One supporting commenter expressed the view that the proposed amendments would ensure that the terms of Sections 13(d) and (g) will be applied as originally intended.[485] Another commenter observed that the proposed amendments appear designed to simply adhere to the underlying statutory language in the Exchange Act.[486] One commenter stated that it supported the proposed amendments and observed that, under the proposed amendments, compliance with the group formation rules would not depend on whether an express or implied agreement exists among the parties that are acting together.[487] One commenter asserted that the proposed amendments "could prevent sophisticated investors from skirting reporting requirements when coordinating accumulations of significant stakes" which could "help[] ensure retail investors have fair insight."[488]

Several commenters expressed views rejecting criticism that the proposed amendments would interfere with shareholder activism or collaboration.[489] One of these commenters disagreed with the contention by other commenters that such amendments would prevent the build-up of ownership stakes and chill shareholder communications.[490] Another commenter disagreed with concerns that the proposal "would put mainstream institutional investors at risk of being deemed part of a group simply because they take a meeting with an activist or management

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483 Although commenters generally focused on proposed Rule 13d-5(b)(1)(i) and did not explicitly address proposed Rule 13d-5(b)(2)(i), given the substantial similarity of those proposed rules, we treat comments on proposed Rule 13d-5(b)(1)(i) as also applying to proposed Rule 13d-5(b)(2)(i) unless the comment letter stated otherwise.

484 *See* letters from AFREF; AFREF, et al.; BRT; Freeport-McMoRan; Labor Unions; Nasdaq; NIRI; P. Worts; Perkins Coie; R. Rutkowski; SCG; Sen. Baldwin, et al.; T. Reilly; WLRK I; WLRK II.

485 *See* letter from NIRI.

486 *See* letter from WLRK II.

487 *See* letter from SCG.

488 *See* letter from P. Worts.

489 *See* letters from AFL-CIO; Sen. Baldwin, et al.; WLRK II.

490 *See* letter from Sen. Baldwin, et al.

and indicate that they may be inclined to vote in favor of their proposed course of action."[491] This commenter further stated that it did not view the proposal as propounding a definition of "group" that would consider a "regular passive institutional investor" as a member of a group with an activist simply because it met with an activist, heard its proposed plans, and signaled it would likely use its voting power to support the activist's proposed campaign.[492] One commenter stated a similar view, asserting that nothing in the proposal would limit the ability of investors to engage with company management.[493]

In addition, although the IAC did not make a recommendation with respect to the proposed amendments to Rule 13d-5 "because of a lack of consensus on the effects of the proposed definition of a 'group' and how that would impact shareholder communication," the IAC stated that it "agree[d] with the SEC's description of existing case-law regarding the definition of 'group'" and "would support the inclusion of such description in any final rulemaking regarding Schedule 13D reporting to highlight to market participants the scope of such case law when considering the applicability of the 'group' rules."[494]

Numerous commenters opposed the proposed amendments, largely because, in their view, the proposed amendments would eliminate a requirement that there be some form of "agreement" among members of a group.[495] Some opposing commenters expressed the view that

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491 *See* letter from WLRK II.

492 *See id*.

493 *See* letter from Sen. Baldwin, et al.

494 *See* IAC Recommendations.

495 *See* letters from Andrew L. Stern, SEIU (Apr. 11, 2022) ("A. Stern"); ABA; AIMA; Steven M. Rothstein, Managing Director, Ceres Accelerator for Sustainable Capital Markets, Ceres, Inc. (Apr. 11, 2022) ("Ceres"); CIRCA I; CIRCA III; Dodge & Cox; EIM I; HMA II; IAA; ICI I; ICM; MFA; Neuberger Berman Group LLC (Apr. 11, 2022) ("NBG"); O'Melveny & Myers; Benjamin Edwards, Associate

the proposal—particularly the removal of some form of an "agreement"—would exceed the Commission's authority under the Exchange Act or raise concerns under the APA or the U.S. Constitution.[496] One commenter asserted that eliminating the "agreement" requirement in determining whether a group has been formed would contravene the plain meaning of the statutory text, disregard the legislative history, and depart from "long-established" judicial precedent.[497] The same commenter asserted that the initial adoption of Rule 13d-5, with what the commenter described as its express requirement for an agreement to exist in order to establish group status, simply reflected the Commission's affirmation of established judicial precedent, not an unwarranted departure from the statutory language.[498] A number of commenters expressed similar points of view, and, among other things, used canons of construction or statutory analysis to assert that persons can only "act as" a group under Section 13(d)(3) if an agreement exists among the group members.[499] Another commenter suggested the absence of the term "agreement" from Section 13(d)(3) did not restrict the Commission's capacity to use the term "agree" in Rule 13d-5(b) because administrative rulemakings commonly include language not present in a statute in order to implement Congressional intent.[500]

Professor of Law, University of Nevada, Las Vegas, William S. Boyd School of Law, Sarah C. Haan, Professor of Law and Cary Martin Shelby, Professor of Law, Washington and Lee University School of Law, Geeyoung Min, Assistant Professor of Law, Michigan State University College of Law, Faith Stevelman, Professor of Law, New York Law School (Apr. 12, 2022) ("Prof. Edwards, et al."); Prof. Gordon; David H. Webber, Professor of Law and Paul M. Siskind Scholar, Boston University School of Law (Apr. 11, 2022) ("Prof. Webber"); Profs. Bishop and Partnoy I; Profs. Bishop and Partnoy II; Profs. Bishop and Partnoy III; Halit Coussin, Chief Legal Officer & Chief Compliance Officer, Pershing Square Capital Management, L.P. (Apr. 11, 2022) ("PSCM"); Rice Management; SIFMA; SIFMA AMG; SIFMA & SIFMA AMG; SSC; STB; TRP.

496 *See* letters from CIRCA I; EIM I; ICI I; MFA; Prof. Edwards, et al.; PSCM; SIFMA.

497 *See* letter from EIM I.

498 *See id*.

499 *See* letters from CIRCA I; EIM I, MFA; SIFMA; SIFMA AMG.

500 *See* letter from PSCM.

Some opposing commenters expressed concern that the proposed amendments would introduce a standard that was overly broad and that could chill or eliminate shareholder communications with other shareholders, issuers' management and/or other parties.[501] One commenter expressed the view that the proposal could deter investors from engaging in "socially valuable activism" and noted that to the extent that the proposed rules resulted in restraints on shareholder communications, that may lead to claims that the proposed rules burden investors' First Amendment rights.[502] The commenter also stated that the Commission "should take care to minimize any burdens on investors' expression."[503] Other commenters anticipated that under the proposed amendments, ordinary course business transactions or conversations, without more, could result in a finding of group formation.[504] One commenter raised the concern that the proposed rule would produce disruptive collateral consequences, including in relation to ownership reporting under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 Act as it is uncertain whether being deemed a member of a group would deprive an investor of relying on the "passive investor" exemption from the antitrust notification requirements under that statute.[505] A number of commenters also asserted that the proposed amendments would prompt litigation over whether communications between parties resulted in group formation.[506] Some commenters expressed the view that the resulting increase in uncertainty that would be caused by

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501 *See* letters from A. Stern; ABA; Ceres; CIRCA I; Dodge & Cox; EIM I; IAA; MFA; NBG; Prof. Edwards, et al.; Prof. Gordon; Prof. Webber; Profs. Bishop and Partnoy II; Rice Management; SIFMA; STB; TRP; *see also* letter from MFA & NAPFM.

502 *See* letter from Prof. Edwards, et al.

503 *Id*.

504 *See* letters from HMA II; IAA; MFA; Perkins Coie; Prof. Gordon; Profs. Bishop and Partnoy I; SIFMA; SIFMA AMG; SSC; TRP.

505 *See* letter from PSCM.

506 *See* letters from ABA; Dodge & Cox; EIM I; Prof. Edwards, et al.; Prof. Gordon; PSCM; Rice Management; SIFMA.

the proposed amendments also would result in additional legal exposure under Exchange Act Section 16 for persons alleged to have formed a group.[507]

Opposing commenters also criticized the proposed amendments as inconsistent with those Federal court opinions that have addressed the standard for group formation.[508] One commenter asserted that courts have recognized an "agreement" as being a necessary element of group formation based on the need for a "workable compromise" between the regulatory objective of having a statute's policies implemented, on one hand, and the market's need for clear rules, on the other hand.[509] Another commenter expressed concern that the proposed amendments would, in its view, dispense "with more than 40 years of practice and court decisions" and replace them "with a vague, circular rule . . . impossibly burdensome to market participants."[510] One commenter noted that Federal courts "have consistently held that the existence of an agreement is necessary to establish the existence of a 'group' under Section 13(d)."[511] Other commenters expressed the view that the existing standards in Rule 13d-5(b) have worked well for decades or are not in need of reform.[512] Notwithstanding these and other similar criticisms,[513] we note that multiple opposing commenters recognized that, even today, the

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507 *See* letters from ABA; EIM I; SIFMA; *see also* letter from MFA & NAPFM.

508 *See* letters from AIMA; CIRCA I; EIM I; ICI I; MFA; PSCM; SIFMA; SIFMA AMG.

509 *See* letter from SIFMA.

510 *See* letter from SIFMA AMG.

511 *See* letter from EIM I ("Until now, courts have sensibly required and the markets have understood that there must be an agreement (whether implicit or explicit) between shareholders before they could be legally found to be a group and subject to the consequences of such a finding.").

512 *See* letters from AIMA; EIM I; ICI I; Profs. Bishop and Partnoy II; PSCM; SSC; STB.

513 *See* letters from AIMA; CIRCA I; ICI I; MFA; PSCM.

determination of whether or not a group exists is ultimately dependent upon the facts and circumstances.[514]

A number of commenters offered suggestions on how the Commission should proceed with respect to the proposed amendments.[515] Some commenters expressed the view that the Commission should set forth more specific parameters of what joint conduct or communications may result in group formation.[516] A few commenters offered alternative language to be used in any revision the Commission may ultimately adopt.[517] One commenter encouraged the Commission to consider exempting QIIs from any new "group formation" provisions so long as QIIs act consistently with the requirements of Rule 13d-1(b).[518] One commenter suggested that the Commission adopt the equivalent of an exemption from Section 16 for any groups formed pursuant to the proposed amendments.[519] Another commenter suggested that the proposed amendments should not be adopted unless a safe harbor is created for securities dealing activities.[520] One commenter recommended no change to the proposal but expressed the view that the proposed rules would not interfere with shareholder rights to engage in, among other things, shareholder activism on ESG issues, collaboration on Rule 14a-8 shareholder proposals,

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514 *See* letters from EIM I; ICI I; Profs. Bishop and Partnoy I; PSCM; SIFMA; STB.

515 *See* letters from ABA; AFREF; AIMA; HMA II; IAA; ICI I; Labor Unions; MFA; Perkins Coie; Profs. Bishop and Partnoy II (expressing the view that it would be sufficient for the Commission to issue guidance instead of adopting a rule change and recommending that the Commission take the position that it "intends to enforce the 'group' definition as it stands"); SIFMA; SSC; STB; TRP.

516 *See* letters from ABA; HMA II; IAA; Perkins Coie; TRP.

517 *See* letters from ABA; MFA.

518 *See* letter from ABA.

519 *See* letter from SIFMA. One commenter, which generally supported the proposal, similarly recommended that the Commission address concerns that the proposal could result in a "regular passive institutional investor" becoming a member of a group with an activist simply because it met with the activist, heard its proposed plans, and signaled that it would likely use its voting power to support the activist's proposed campaign. *See* letter from WLRK II.

520 *See* letter from SIFMA.

and "vote no" initiatives and any concerns regarding the filing obligations of such investor groups could be clarified by the Commission in an explanatory statement issued with any final rule.[521] Another commenter stated the Commission should consider whether the public dissemination of information on message boards or through media interviews, and, by extension, social media platforms, could result in group formation.[522]

A number of commenters recommended no change be made to current Rule 13d-5(b)(1),[523] which, according to some of these commenters, would result in retention of the "agreement" standard. One commenter made reference to existing Rule 13d-5(b) and advocated for the Commission to retain what it referred to as the "current 'group' definition," including the requirement that there be an agreement to act as a group, because the current provision does not: (1) chill shareholder engagement; (2) create the challenge to determine whether a group has been formed or if an exemption applies; or (3) make activist campaigns more difficult to pursue.[524]

Commenters also expressed differing views on proposed Rule 13d-5(b)(1)(ii). Some commenters expressly supported the proposal.[525] One commenter stated that because information about a planned Schedule 13D filing is clearly material to investors, it makes sense to deem tippers and tippees to be acting as a group even without an explicit agreement.[526] Another commenter, while expressing the view that modifications should be made to the Commission's

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521 *See* letter from Labor Unions.

522 *See* letter from STB.

523 *See* letters from AIMA; ICI I; SIFMA; SSC.

524 *See* letter from AIMA.

525 *See* letters from Perkins Coie; R. Rutkowski; Reilly Steel, Ph.D. Candidate, Department of Politics, Princeton University, and Zohar Goshen, Jerome L. Greene Professor of Transactional Law, Columbia Law School (May 22, 2023) ("R. Steel and Prof. Goshen") (supporting the proposal conditionally, if Congress does not take the action that the commenter recommended as the primary course of action and if the Commission actively enforces the proposed rule and seeks expansive remedies); SCG.

526 *See* letter from SCG.

overall proposed amendments relating to group formation, stated that the "definition of who should constitute a 'group' under the proposal . . . should only apply to the sharing of material nonpublic information related to not yet disclosed large positions instead of efforts to improve the long-term corporate governance of companies."[527]

Other commenters opposed the proposal.[528] One commenter analyzed the proposed rule text and observed that linking "indirectly discloses" to the "with the purpose of causing" clause appears intended to establish a presumption, for all practical purposes, that an acquisition by "such other person" was "based on such information."[529] Another commenter similarly expressed the view that such a rule would be unfair given that an adviser may also have independently determined to acquire or even continue to hold the same securities and disclosure of the imminent Schedule 13D may have been outside of the adviser's control and without his or her input or expression of approval.[530] Another commenter similarly asserted that the proposed rule would place those who receive information from a blockholder at risk of inadvertently becoming subject to group reporting obligations in circumstances that were "never intended to be covered by Section 13."[531]

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527 *See* letter from R. Rutkowski.

528 *See* letters from Dodge & Cox; EIM I; HMA I (stating its belief that "straightforward application of existing law" is sufficient); IAA; PSCM (citing proposed Rule 13d-5(b)(1)(iii) but apparently referring to proposed Rule 13d-5(b)(1)(ii)); SIFMA; SIFMA AMG.

529 *See* letter from SIFMA AMG (adding that this apparent presumption would be unfair, inappropriate, and poorly tailored, and citing to the example of a client acquiring shares from a dealer who also coincidentally acquires shares).

530 *See* letter from IAA (observing that that adoption of any such rule would be unfair absent some intent to form a group because certain parties could be restricted from buying shares just because a third party told an adviser that it was going to file a Schedule 13D).

531 *See* letter from PSCM.

Some commenters provided recommendations to revise the proposal.[532] One commenter suggested the Commission alternatively "impose a prohibition on tipping by an activist as soon as it reaches the 5 percent disclosure threshold until it files a Schedule 13D."[533] One commenter recommended that the Commission address concerns that the proposal could result in a passive institutional investor becoming a member of a group with an activist simply because it met with the activist, heard its proposed plans, and signaled that it would likely use its voting power to support the activist's proposed campaign by revising proposed Rule 13d-5(b)(1)(ii) to include its suggested alternative text.[534] One commenter, who neither clearly supported nor opposed the proposal, stated that it would be "deeply troubled if the Commission were to invent a new, extremely difficult to establish element to insider trading law, such as a requirement that the recipient of the tip have an intention of coordinating with the tipper or make its purchases in reliance on the non-public information that the tipper provided."[535] A commenter objected to the concept of "indirect" disclosure within proposed Rule 13d-5(b)(1)(ii) on grounds that the term "indirect" is "intrinsically ill-defined" and could create a presumption that certain transactions in the ordinary course of a market-making business were executed "based on such [indirect] information."[536] Another commenter similarly suggested that the rule, if adopted, should only apply to situations where an express or implied intent by parties exists to form a group.[537]

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532 *See* letters from AIMA; IAA; Prof. Gordon; SIFMA; SIFMA AMG; STB.

533 *See* letter from Prof. Gordon; *see also* letter from R. Steel and Prof. Goshen.

534 *See* letter from WLRK II. Another commenter, which objected to the proposed amendments to Rule 13d-5 in the Proposing Release, specifically responded to that commenter's recommended alternative, intimating that the Commission should not adopt this suggested change for a variety of reasons. *See* letter from Profs. Bishop and Partnoy II.

535 *See* letter from HMA I.

536 *See* letter from SIFMA.

537 *See* letter from IAA.

Commenters also expressed observations concerning the collateral consequences to an investor that received information about an impending Schedule 13D filing. One commenter implicitly asked the Commission to consider that once the tippee has the information, "[t]his quasi-lock-up period not only discourages other shareholders from meeting with the activist but also, effectively, removes the liquidity these other shareholders may provide to the market in that issuer."[538] Another commenter suggested the rule should clarify for how long a recipient of information that a Schedule 13D filing would be forthcoming must remain "frozen" from making further purchases, particularly if such filing does not get filed in the near term.[539]

c. Commission Guidance

As noted above, we are not adopting proposed Rules 13d-5(b)(1)(i), (b)(1)(ii), and (b)(2)(i). The Commission's stated objectives were to (1) align the text of Rule 13d-5(b) with the statutory provisions that it serves to implement while clarifying and affirming its application and operation and (2) provide clarity on whether a group is formed if a person shares information about an upcoming Schedule 13D filing that the person is or will be required to make.[540] The proposed amendments were not intended to change how the Commission views what is meant by "act as a group" for purposes of Sections 13(d)(3) and 13(g)(3). They were intended to codify through a rule amendment our views that "the determination of whether two or more persons are acting as a group does not depend solely on the presence of an express agreement and that, depending on the particular facts and circumstances, concerted actions by two or more persons for the purpose of acquiring, holding or disposing of securities of an issuer are sufficient to

538 *See* letter from AIMA.

539 *See* letter from STB.

540 *See* Proposing Release at 13869.

constitute the formation of a group."[541] Several commenters generally shared our view that the formation of a group does not depend on the presence of an express agreement.[542] However, some commenters raised objections to the proposal based on their view that the amendments could result in a group being formed for purposes of Sections 13(d)(3) and 13(g)(3) absent some evidence of agreement, arrangement, understanding, or concerted action. That was not the Commission's intent. Upon consideration of the comments received, we believe that the better approach is not to adopt the proposed amendment to Rule 13d-5 but instead to provide guidance as to the application of the existing legal standard established in Sections 13(d)(3) and 13(g)(3) with respect to the formation of a group.[543]

i. Background of the Regulatory Framework

Sections 13(d)(3) and 13(g)(3) are identical, and each of these provisions provides that "[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person.'" As the Commission noted in the Proposing Release, Congress enacted these provisions based on two

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541 *Id*. at 13868-69.

542 *See, e.g.*, letters from EIM I ("[A]n agreement can be constituted informally, and without a writing. The Commission, in adopting Rule 13d-5 in 1977, selected the word 'agreement' rather than 'contract' for a reason—an agreement is a less formal arrangement, which is consistent with the requirement of Section 13(d)(3) that the persons 'act together.'"); PSCM ("Courts, whether looking to the existence of an agreement out of an interpretation that Rule 13d-5(b) requires it, or as an administrable evidentiary standard for establishing action in concert, have interpreted the term 'agreement' broadly to include informal and unwritten arrangements, and have relied on circumstantial evidence in order to establish that some manner of agreement existed."); SIFMA ("[T]he existence of a group surely does not depend on the intent of the members to create and wear the label of a 'Section 13(d) group.' It does, however, depend on an intent to take the coordinated actions that will create that relationship."). *Cf.*, letter from ABA (explaining that an agreement need not be "written" or "formal" and acknowledging that Rule 13d-5(b) could be modified to add "arrangement or understanding" to address any concern that the term "agreement" has been misconstrued in the context of Rule 13d5(b)).

543 In addition to the guidance set forth in this section, we provide additional guidance in Section II.D.3 in connection with the discussion regarding our final disposition of the proposed exemptions under Rule 13d-6.

practical considerations.[544] First, Sections 13(d)(1) and 13(g)(1), by their terms, apply to, and impose filing obligations upon, a single "person."[545] Second, Congress recognized the need to protect against the evasion of disclosure requirements by persons who collectively sought to change or influence control of an issuer yet who each acquired and held an amount of beneficial ownership at or just below the reporting threshold.[546]

Congress sought to address this problem of coordinated circumvention by deeming two or more persons to be one person for purposes of Sections 13(d) and 13(g). Based on the statutory treatment of two or more persons as if they were a single person when they "act as" a group for at least one of the three purposes specified in the statutory provisions (*i.e.*, acquiring, holding, or disposing of securities of an issuer), the beneficial ownership collectively held by the group members is imputed to the group. If the aggregate amount of beneficial ownership exceeds five percent of a covered class, the group may be required to file a beneficial ownership report. The determination of which statutory provision (*i.e.*, Section 13(d)(3) or 13(g)(3)) applies to a group depends on whether a non-exempt acquisition of beneficial ownership has been made that can be imputed to the group and, when on its own or added to any other beneficial ownership held by the group, results in the group's beneficial ownership exceeding five percent of the covered class. If such an acquisition occurs, the group is subject to regulation under Section

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544 *See* Proposing Release at 13865.

545 Because Sections 13(d)(3) and 13(g)(3) "deem" a group to be a single "person," the correct articulation of how the statutory framework applies in this context is to a "person, including any group" and not a "person or group." Thus, under Sections 13(d) and 13(g) and Regulation 13D-G, groups are regulated no differently from natural persons or companies described in the definition of "person" under Section 3(a)(9) of the Exchange Act.

546 Section 13(d)(3) was enacted to prevent "easy avoidance of [S]ection 13(d)'s disclosure requirements by a group of investors acting together in their acquisition or holding of securities." S. Rep. No. 550, at 8 (1967); H.R. No. 1711, at 8-9 (1968); *see also* 113 CONG. REC. Bill S. 510 (Jan. 18, 1967) (noting that the specific provision applicable to groups was added to "close the loophole that now exists which allows a syndicate, where no member owns more than 10 percent, to escape the reporting requirements of the Securities Exchange Act").

13(d).[547] If no such acquisition attributable to the group has occurred, but the collective amount of beneficial ownership held by the group members exceeds five percent of a covered class at the end of a calendar year under current rules[548] (or at the end of a calendar quarter based on the amendments to Rule 13d-1 we are adopting in this release), the group is subject to Section 13(g).

ii. Guidance

Neither the statute nor our rules provide a definition of a "group." The appropriate legal standard for determining whether a group is formed is found in Sections 13(d)(3) and 13(g)(3). While some may view the language of Rule 13d-5(b) as providing a definition of "group," we reiterate that neither the current rule nor its predecessor[549] was designed or adopted by the Commission to serve as a substitute for the legal standard expressly stated in Sections 13(d)(3) and 13(g)(3) for determining when two or more persons form a group.[550]

Whether two or more persons have formed a group as contemplated by Sections 13(d)(3) and 13(g)(3) depends on a determination of whether they acted together for the purpose of "acquiring," "holding," or "disposing of" securities of an issuer.[551] Such persons could be

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547 The operative term "after acquiring" in Section 13(d)(1) makes the application of Section 13(d) contingent upon the existence of an acquisition. Determining that an acquisition has occurred—in particular, an acquisition that is neither exempt nor otherwise not recognized under Section 13(d)(1)—is thus necessary to establish the application of Section 13(d).

548 *See* 17 CFR 240.13d-1.

549 The predecessor rule, Rule 13d-6, was redesignated Rule 13d-5 in 1978. *See* Filing and Disclosure Release. Unless otherwise noted, references to Rule 13d-5 in this section of the release also refer to the predecessor Rule 13d-6.

550 When proposing Rule 13d-5(b), the Commission did not present the rule as a proposed definition of "group," solicit comment on the sufficiency or any limitations of any such definition, or use any reference to the term "group" in the proposed rule text. *See Disclosure of Corporate Ownership*, Release No. 34-11616 (Aug. 25, 1975) [40 FR 42212 (Sept. 11, 1975)]. Instead, the Commission explained that it was proposing to define the term "acquisition" to address certain technical issues with respect to Section 13(d) and the determination of the due date for a Schedule 13D.

551 The Commission, in adopting Rule 13d-5(b)(1), indicated that it viewed the term "holding" as subsuming the term "voting," but nevertheless expressly referenced the term "voting" in the rule for the avoidance of doubt. *See* Proposing Release at 13869 n.135 (citing Filing and Disclosure Release at 18492).

viewed as acting together if they are taking concerted actions in furtherance of any of these purposes.[552] The determination depends on an analysis of all the relevant facts and circumstances and not solely on the presence or absence of an express agreement, as two or more persons may take concerted action or agree informally.[553] This approach is consistent with the statutory language of Sections 13(d)(3) and 13(g)(3) and with the purpose of these statutory provisions.[554] It also is consistent with views previously expressed by courts and the Commission, which have determined that groups were established by activities that fell short of an express agreement.[555] Indeed, the Commission recognizes that for a finder of fact, including the Commission itself, to determine that a group has been formed under Section 13(d)(3) or 13(g)(3), the evidence must show, at a minimum, indicia, such as an informal arrangement or coordination in furtherance, of

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552 *See, e.g.*, *SEC v. Levy*, 706 F. Supp. 61, 69 (D.D.C. 1989) ("In order to find that a 'group' exists under Section 13(d)(3), a court must find that two or more people have formed a combination in support of a common objective."); *In the Matter of John A. Carley*, Release No. 34-50695 (Nov. 18, 2004) ("A group need not be formally organized, nor memorialize its intentions in writing . . . . All that is required is that its members combine in furtherance of a common objective."); *In the Matter of John Joslyn, Joseph Marsh, P. David Lucas, Steven Sybesma, Stanley Thomas and Jon Thompson*, Release No. 34-50588 (Oct. 26, 2004).

553 Proposing Release at 13868.

554 Both the House and Senate Reports accompanying the bill reflect an effort to prevent circumvention of the reporting threshold in this situation with the inclusion of a provision "that would prevent a group of persons who seek to pool their voting or other interests from evading the . . . statute because no one individual owns more than [five] percent." *See* Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, at 9 (1968) and Full Disclosure of Corporate Equity Ownership and in Corporate Takeover Bid, S. 510, Report of the S. Comm. On Banking and Currency, 90th Cong. 1, 8 (1967). As such, the reports noted that Section 13(d)(3) "is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership [b]y reason of any contract, *understanding, relationship,* agreement or *other arrangement*" (emphasis added). S. Rep. No. 550, at 8 (1967); H.R. Rep. No. 1711, at. 8-9 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 2811, 2818. *Id.*

555 Group activity may be demonstrated by circumstantial evidence. *See* Proposing Release at 13868, n. 132 (citing *SEC v. Savoy Indus., Inc.*, 587 F.2d 1149, 1162 (D.C. Cir. 1978) and noting as indicia of group formation: (1) the presence of a common plan or goal, *Fin. Gen. Bankshares, Inc. v. Lance*, 1978 WL 1082, at *9 (D.D.C. 1978); (2) "considerable dissatisfaction" with certain officers and a "desire to reduce" those officers' role in company management, *Id.* at *10; (3) strategy meetings with, among others, attorneys, *SEC v. Levy*, 706 F. Supp. 61, 70 (D.D.C. 1989); (4) a pattern of coordinated stock purchases, *Hallwood Realty Partners, LP v. Gotham Partners, LP*, 286 F.3d 613, 618 (2d Cir. 2002); (5) the solicitation of others to join the group, *Wellman v. Dickinson,* 682 F.2d 355 363-364 (2d Cir. 1979), cert. denied sub. nom. *Dickinson* v. *SEC,* 460 U.S. 1069 (1983); or (6) the existence of communications between and among group members. *Gen. Aircraft Corp. v. Lampert*, 556 F.2d 90, 95 (1st Cir. 1977)); *see also supra* note 482.

a common purpose to acquire, hold, or dispose of securities of an issuer. If two or more persons took similar actions, that fact is not conclusive in and of itself that a group has been formed.[556] We therefore disagree with the comments raising constitutional concerns, as well as the comments concerning the scope of our authority under the Exchange Act and the APA. We note, however, that those comments were directed at the proposed amendment to Rule 13d-5 and the belief that the contemplated rule change meant the Commission was taking a position that a group could be formed without some type of an agreement, arrangement, understanding, or concerted action. As explained above, this is not the Commission's view, and we are not adopting the proposed amendment to Rule 13d-5. Further, the commenters' concerns are not implicated by the guidance we provide here.

Relatedly, we recognize the concern expressed by some commenters that the Commission's proposal to amend Rule 13d-5 could chill shareholder engagement, with, some commenters asserted, shareholders unable to communicate freely with each other or with the issuer's management without forming a group. In response to some of the concerns raised by commenters, we provide guidance below on the application of the current legal standard found in Section 13(d)(3) and 13(g)(3) to certain common types of shareholder engagement activities.[557]

Question: Is a group formed when two or more shareholders communicate with each other regarding an issuer or its securities (including discussions that relate to improvement of the long-term performance of the issuer, changes in issuer practices, submissions or solicitations in support of a non-binding shareholder proposal, a joint engagement strategy (that is not control-

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556 The Commission recognizes that inadvertent or coincidental contact would not be sufficient to satisfy the standard given the absence of volitional acts made in concert or in coordination with others.

557 Each illustration assumes that the rules adopted in this release are in effect and that the securities of the subject company are in a covered class.

related), or a "vote no" campaign against individual directors in uncontested elections) without taking any other actions?

Response: No. In our view, a discussion whether held in private, such as a meeting between two parties, or in a public forum, such as a conference that involves an independent and free exchange of ideas and views among shareholders, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3). Sections 13(d)(3) and 13(g)(3) were intended to prevent circumvention of the disclosures required by Schedules 13D and 13G, not to complicate shareholders' ability to independently and freely express their views and ideas to one another. The policy objectives ordinarily served by Schedule 13D or Schedule 13G filings would not be advanced by requiring disclosure that reports this or similar types of shareholder communications. Thus, an exchange of views and any other type of dialogue in oral or written form not involving an intent to engage in concerted actions or other agreement with respect to the acquisition, holding, or disposition of securities, standing alone, would not constitute an "act" undertaken for the purpose of "holding" securities of the issuer under Section 13(d)(3) or 13(g)(3).

Question: Is a group formed when two or more shareholders engage in discussions with an issuer's management, without taking any other actions?

Response: No. For the same reasons described above, we do not believe that two or more shareholders "act as a . . . group" for the purpose of "holding" a covered class within the meaning of those terms as they appear in Section 13(d)(3) or 13(g)(3) if they simply engage in a similar exchange of ideas and views, alone and without more, with an issuer's management.

Question: Is a group formed when shareholders jointly make recommendations to an issuer regarding the structure and composition of the issuer's board of directors where (1) no discussion

of individual directors or board expansion occurs and (2) no commitments are made, or agreements or understandings are reached, among the shareholders regarding the potential withholding of their votes to approve, or voting against, management's director candidates if the issuer does not take steps to implement the shareholders' recommended actions?

Response: No. Where recommendations are made in the context of a discussion that does not involve an attempt to convince the board to take specific actions through a change in the existing board membership or bind the board to take action, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as they appear in Sections 13(d)(3) or 13(g)(3). Rather, we view this engagement as the type of independent and free exchange of ideas between shareholders and issuers' management that does not implicate the policy concerns addressed by Section 13(d) or Section 13(g).

Question: Is a group formed if shareholders jointly submit a non-binding shareholder proposal to an issuer pursuant to Exchange Act Rule 14a-8 for presentation at a meeting of shareholders?

Response: No. The Rule 14a-8 shareholder proposal submission process is simply another means through which shareholders can express their views to an issuer's management and board and other shareholders. For purposes of group formation, we do not believe shareholders engaging in a free and independent exchange of thoughts about a potential shareholder proposal, jointly submitting, or jointly presenting, a non-binding proposal to an issuer in accordance with Rule 14a-8 (or other means) should be treated differently from, for example, shareholders jointly meeting with an issuer's management without other indicia of group formation. Accordingly, where the proposal is non-binding, we do not believe that the shareholders "act as a . . . group" for the purpose of "holding" securities of the covered class within the meaning of those terms as

they appear in Section 13(d)(3) or 13(g)(3). Assuming that the joint conduct has been limited to the creation, submission, and/or presentation of a non-binding proposal,[558] those statutory provisions would not result in the shareholders being treated as a group, and the shareholders' beneficial ownership would not be aggregated for purposes of determining whether the five percent threshold under Section 13(d)(1) or 13(g)(1) had been crossed.

Question: Would a conversation, email, phone contact, or meetings between a shareholder and an activist investor that is seeking support for its proposals to an issuer's board or management, without more, such as consenting or committing to a course of action,[559] constitute such coordination as would result in the shareholder and activist being deemed to form a group?

Response: No. Communications such as the types described, alone and without more, would not be sufficient to satisfy the "act as a . . . group" standard in Sections 13(d)(3) and 13(g)(3) as they are merely the exchange of views among shareholders about the issuer. This view is consistent with the Commission's previous statement that a shareholder who is a passive recipient of proxy soliciting activities, without more, would not be deemed a member of a group with persons conducting the solicitation.[560] Activities that extend beyond these types of communications, which include joint or coordinated publication of soliciting materials with an activist investor might, however, be indicative of group formation, depending upon the facts and circumstances.

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558 The conclusion reflected in this example assumes the Rule 14a-8 or other non-binding shareholder proposal is submitted jointly and without "springing conditions" such as an arrangement, understanding, or agreement among the shareholders to vote against director candidates nominated by the issuer's management or other management proposals if the non-binding proposal is not included in the issuer's proxy statement or, if passed, not acted upon favorably by the issuer's board.

559 Examples of the type of consents or commitments given in furtherance of a common purpose to acquire, hold (inclusive of voting), or dispose of securities of an issuer could include the granting of irrevocable proxies or the execution of written consents or voting agreements that demonstrate that the parties had an arrangement to act in concert.

560 *Amendments to Beneficial Ownership Reporting Requirements*, Release No. 34-39538 (Jan. 12, 1998) [63 FR 2854, 2858 (Jan. 16, 1998)].

Question: Would an announcement or a communication by a shareholder of the shareholder's intention to vote in favor of an unaffiliated activist investor's director nominees, without more, constitute coordination sufficient to find that the shareholder and the activist investor formed a group?

Response: No. We do not view a shareholder's independently-determined act of exercising its voting rights, and any announcements or communications regarding its voting decision, without more, as indicia of group formation. This view is consistent with our general approach towards the exercise of the right of suffrage by a shareholder in other areas of the Federal securities laws.[561] Shareholders, whether institutional or otherwise, are thus not engaging in conduct at risk of being deemed to give rise to group formation as a result of simply independently announcing or advising others—including the issuer—how they intend to vote and the reasons why.

Question: If a beneficial owner of a substantial block of a covered class that is or will be required to file a Schedule 13D intentionally communicates to other market participants (including investors) that such a filing will be made (to the extent this information is not yet public) with the purpose of causing such persons to make purchases in the same covered class, and one or more of the other market participants make purchases in the same covered class as a direct result of that communication, would the blockholder and any of those market participants that made purchases potentially become subject to regulation as a group?

Response: Yes. To the extent the information was shared by the blockholder with the purpose of causing others to make purchases in the same covered class and the purchases were made as a direct result of the blockholder's information, these activities raise the possibility that all of these

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[561] For example, public announcement of a voting intention qualifies for the exclusion from the definition of solicitation under Rule 14a-1(l)(2)(iv).

beneficial owners are "act[ing] as" a "group for the purpose of acquiring" securities of the covered class within the meaning of Section 13(d)(3). Such purchases may implicate the need for public disclosure underlying Section 13(d)(3) and these purchases could potentially be deemed as having been undertaken by a "group" for the purpose of "acquiring" securities as specified under Section 13(d)(3).[562] Given that a Schedule 13D filing may affect the market for and the price of an issuer's securities, non-public information that a person will make a Schedule 13D filing in the near future can be material.[563] By privately sharing this material information in advance of the public filing deadline, the blockholder may incentivize the market participants who received the information to acquire shares before the filing is made.[564] Such arrangements also raise investor protection concerns regarding perceived unfairness and trust in markets.[565]

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562 While each group member individually bears a reporting obligation arising under Rule 13d-1(k)(2), a tippee would not become a member of a group, and thus would not incur a reporting obligation, until it makes a purchase of securities of the same covered class in response to having been tipped even if the tippee already is a beneficial owner of that class.

563 *See* Alon Brav, Wei Jiang, Frank Partnoy, and Randall S. Thomas, *Hedge Fund Activism, Corporate Governance and Firm Performance*, 61 J. FIN. 1729 (2008) (finding on average an abnormal short-term return of 7% over the window before and after a Schedule 13D filing); Marco Brecht, Julian Franks, Jeremy Grant, and Hammes F. Wagner, *The Returns to Hedge Fund Activism: An International Study*, CENTER FOR ECONOMIC POLICY RESEARCH, Discussion Paper No. 10507 (Mar. 15, 2015).

564 *See, e.g.*, Susan Pulliam, Juliet Chung, David Benoit, and Rob Barry, *Activist Investors Often Leak Their Plans to a Favored Few*, WALL ST. J. (Mar. 26, 2014), *available at* https://www.wsj.com/articles/SB10001424052702304888404579381250791474792 ("Activists, who push for broad changes at companies or try to move prices with their arguments, sometimes provide word of their campaigns to a favored few fellow investors days or weeks before they announce a big trade, which typically jolts the stock higher or lower.").

565 For example, any near-term gains made by these other investors attributable to information about the impending filing may cause uninformed shareholders who sell at prices reflective of the *status quo* to question the efficacy of existing regulatory framework. Even though the demand to acquire shares in the covered class may increase as a direct result of the blockholder's communications, and in turn increase the prices at which selling shareholders exit, such prices may be discounted in comparison to the price such shareholders would have realized had the information about the impending Schedule 13D filing been public. *See, e.g*. John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 596 (2016) (explaining that "the gains that activists make in trading on asymmetric information—before the Schedule 13D's filing—come at the expense of selling shareholders [and] represent[ ] another wealth transfer"). Consequently, this

The final determination as to whether a group is formed between the blockholder and the other market participants will ultimately depend upon the facts and circumstances, including (1) whether the purpose of the blockholder's communication with the other market participants was to cause them to purchase the securities and (2) whether the market participants' purchases were made as a direct result of the information shared by the blockholder.

2. Proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii)

a. Proposed Amendments

The Commission proposed to amend Rule 13d-5 to expressly impute acquisitions made by a group member after the date of group formation to the group once the collective beneficial ownership among group members exceeds five percent of a covered class.[566] Specifically, proposed Rule 13d-5(b)(1)(iii) would provide that a group under Section 13(d)(3) will be deemed to have acquired beneficial ownership of equity securities of a covered class if any member of the group becomes the beneficial owner of additional equity securities of such covered class after the date of the group's formation. Similarly, proposed Rule 13d-5(b)(2)(ii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under Section 13(g)(3) becomes the beneficial owner of additional

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informational imbalance could, to the extent some perceive it to be unfair, diminish trust in markets. *See, e.g.*, Georgy Chabakauri et al., *Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on Non-Inside Information* (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), *available at* https://ssrn.com/abstract=4018057 (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).

566 As the Commission noted, groups may form at a time when a class of equity securities is not yet registered under Section 12 or the aggregate beneficial ownership held by the membership in the group on the date of its formation is 5% or below of a covered class. *See* Proposing Release at 13870. Expressly capturing post-formation acquisitions of beneficial ownership by group members therefore can become important for purposes of assessing whether a group intentionally tried to evade the reporting process, determining whether an amendment was due for a pre-existing Schedule 13D filing, and evaluating the availability of the Section 13(d)(6)(B) exemption. *See id*.

equity securities of a covered class after the date of the group's formation. The Commission noted that absent an express provision that would treat post-formation acquisitions of beneficial ownership by group members as acquisitions by the group, the Commission or other affected parties must prove the acquisition is attributable to the group.[567]

b. Comments Received

The Commission did not receive any comments on proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii).

c. Final Amendments

For the reasons set forth in the Proposing Release,[568] we are adopting the text of Rules 13d-5(b)(1)(iii) and (b)(2)(ii) substantially as proposed. We also are redesignating these provisions as Rules 13d-5(b)(1)(ii) and (b)(2)(i) and slightly modifying them to account for the possibility that group members may make acquisitions in furtherance of the group's common purpose on the same day the group has been formed. Accordingly, the rule text will now attribute acquisitions by group members to the group at any time after the group has been formed rather than after the date on which the group has been formed.

3. Proposed Rules 13d-5(b)(1)(iv) and (b)(2)(iii)

a. Proposed Amendments

The Commission proposed amendments to Rule 13d-5 to carve out from the purview of proposed Rules 13d-5(b)(1)(iii) and (b)(2)(ii) intra-group transfers of equity securities of a covered class.[569] Specifically, proposed Rule 13d-5(b)(1)(iv) would provide that a group under

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567 Proposing Release at 13870.

568 *See id*.

569 *Id*. at 13870-71.

Section 13(d)(3) will not be deemed to have acquired beneficial ownership in a covered class if a member of the group becomes the beneficial owner of additional equity securities in such covered class through a sale by, or transfer from, another member of the group. Proposed Rule 13d-5(b)(2)(iii) would contain nearly identical language, with conforming changes to address circumstances in which a member of a group under Section 13(g)(3) becomes the beneficial owner of additional equity securities in a covered class through a sale by, or transfer from, another member of the group.

b. Comments Received

The Commission did not receive any comments on proposed Rules 13d-5(b)(1)(iv) and (b)(2)(iii).

c. Final Amendments

For the reasons set forth in the Proposing Release, we are adopting the text of Rules 13d-5(b)(1)(iv) and (b)(2)(iii) substantially as proposed, but redesignating these provisions as Rules 13d-5(b)(1)(iii) and 13d-5(b)(2)(ii). We also are slightly modifying the rule text to account for the possibility that group members may make intra-group transfers on the same day but after the time at which the group has been formed instead of "after the date of group formation."

D. Proposed Amendments to Rule 13d-6 to Create Certain Exemptions

Congress granted the Commission the authority to issue exemptions from the application of Sections 13(d) and 13(g). The Commission can, under Section 13(d)(6)(D), exempt acquisitions "as not entered into for the purpose of, and not having the effect of, changing or influencing the control of the issuer or otherwise as not comprehended within the purposes of [Section 13(d)]."[570] Congress similarly granted the Commission authority, under Section

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570 15 U.S.C. 78(m)(d)(6).

13(g)(6), to exempt any person or class of persons from Section 13(g) "as it deems necessary or appropriate in the public interest or for the protection of investors."[571] The Commission exercised this authority when it adopted Rule 13d-6, titled "Exemption of certain acquisitions." Rule 13d-6 currently sets forth one exemption from Section 13(d) for the acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the securities of the same class as those acquired, provided certain conditions are met.[572]

1. Proposed Amendments

In the Proposing Release, the Commission proposed to exempt certain circumstances from resulting in a person being deemed to have acquired beneficial ownership of, or otherwise to beneficially own, equity securities of a covered class for purposes of Sections 13(d) and 13(g). Specifically, the Commission proposed to amend Rule 13d-6 to:

- Add new paragraph (c) to create an exemption from Sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons take concerted actions with respect to an issuer or a covered class; and
- Add new paragraph (d) to create an exemption from Sections 13(d)(3) and 13(g)(3) for certain circumstances in which two or more persons enter into an agreement setting forth the terms of a derivative security.

The Commission proposed these amendments to Rule 13d-6 to exempt certain actions taken by two or more persons from the scope of Sections 13(d)(3) and 13(g)(3) if those actions

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571 15 U.S.C. 78(m)(g)(6).

572 17 CFR 240.13d-6.

do not have the purpose or effect of changing or influencing the control of an issuer and thus are not within the purpose of Section 13(d).

In light of the proposed amendments to Rule 13d-5, the Commission proposed to add new paragraph (c) to Rule 13d-6 to avoid potentially chilling communications among shareholders or impeding shareholders' engagement with issuers where those activities are undertaken without the purpose or effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect).[573] Proposed Rule 13d-6(c) would provide that two or more persons would not be deemed to have acquired beneficial ownership of, or otherwise beneficially own, an issuer's equity securities as a group solely because of their concerted actions related to an issuer or its equity securities, including engagement with one another or the issuer, provided they meet certain conditions. The Commission noted that such interactions, depending upon the level of coordination and degree to which the persons advocated in furtherance of a common purpose specified within the statutory framework, could be found to satisfy the "act as" a group standard under Section 13(d)(3) or 13(g)(3) for the purpose of "holding" a covered class.[574] To help ensure that the exemption is available only where such persons independently determine to take concerted actions, the proposed exemption would be available only if such persons are not obligated to take such actions (*e.g.*, pursuant to the terms of a cooperation agreement or joint voting agreement).[575]

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573 Proposing Release at 13872.

574 *Id*. at 13873.

575 *Id*.

In addition, the Commission proposed to add new paragraph (d) to Rule 13d-6, in light of proposed new Rule 13d-3(e), to avoid impediments to certain financial institutions' ability to conduct their business in the ordinary course.[576] Proposed Rule 13d-6(d) would have provided that two or more persons would not be deemed to have formed a group under Section 13(d)(3) or 13(g)(3) solely by virtue of their entrance into an agreement governing the terms of a derivative security. This exemption would have been available if the agreement is a bona fide purchase and sale agreement entered into in the ordinary course of business. Further, the exemption would have been available only if such persons did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect.

2. Comments Received

Some commenters supported proposed Rule 13d-6(c),[577] while others generally supported the proposal's intent but expressed some reservations regarding Rule 13d-6(c) as proposed.[578] Some of those commenters generally indicated that the exemption (as proposed or as modified in accordance with their recommendations) could provide clarity that would help prevent the chilling of communications among shareholders and shareholder engagement with issuers.[579] In addition, one commenter appeared to support the inclusion of the "no obligation" to act concept

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576 *Id*.

577 *See, e.g.*, letters from Anonymous (Mar. 13, 2022) ("Anonymous 10"); Kerrie Waring, Chief Executive Officer, ICGN (June 27, 2023) ("ICGN"); Kyle (Mar. 13, 2022) ("Kyle"); Perkins Coie.

578 *See, e.g.*, letters from Ceres (generally supporting the proposal, but stating that the rule, as proposed, could create some ambiguity as to the circumstances under which a group is formed and suggesting changes to the proposal); Jeff Mahoney, General Counsel, Council of Institutional Investors (Apr. 8, 2022) ("CII") (same); ICI I (supporting the intent of the proposal, but stating that the exemption, as proposed, would be too narrow and could create additional uncertainty regarding the circumstances under which a group is formed); Shareholder Rights Group, Interfaith Center on Corporate Responsibility and The Shareholder Commons (Apr. 11, 2022) ("Interfaith Center, et al.") (endorsing the comments in the letter from Ceres).

579 *See* letters from Ceres; CII; ICGN; ICI I; Perkins Coie.

in the second prong of the proposed exception and noted that when the institutional investors that are its members act jointly, they are acting independently, consistent with their fiduciary, legal, and other obligations to their fund participants and beneficiaries.[580]

Other commenters opposed the proposed Rule 13d-6(c) exemption.[581] Some commenters appeared to base their opposition on the argument that such an exemption would impliedly define what a group is by stating what it is not.[582] Several commenters said that ambiguity in the proposed exemption could inhibit market participants' ability to readily discern when a "purpose or effect of changing or influencing control" has been manifested.[583] One commenter further submitted that the subjective "control intent" standard likely will create more uncertainty and confusion than it will resolve.[584] One commenter indicated, in light of its comments on the proposed amendments to Rule 13d-5, that "[t]his rule [exemption] would chill the kind of shareholder communications that are central to a proxy contest" and stated that "[c]onsultation among fellow shareholders and discussion with the activist are . . . essential."[585]

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580 *See* letter from CII.

581 *See, e.g.*, letters from B. Mason; CIRCA I; Dennis and Mary Spohn (June 25, 2023); EIM I; NBG; Prof. Edwards, et al.; Prof. Gordon; Prof. Webber; *see also* letter from SIFMA AMG (describing the proposed exemption as "problematic" and recommending that it not be adopted if the Commission also does not adopt the proposed amendments to Rule 13d-5).

582 *See* letters from CIRCA I; Prof. Edwards, et al.; Prof. Webber. These commenters characterized the proposed exemption as setting forth the *exclusive* circumstances under which two or more persons may engage with one another or an issuer without being regulated as a group. One of these commenters further said that the Commission's description of proposed Rule 13d-6(c) "indicate[d] that two shareholders of the same Covered Security that coordinate in any manner regarding the holding would be deemed to be a group" unless those shareholders qualify for the proposed exemption and that "[t]his is not consistent with the legislative history underlying the Williams Act." *See* letter from CIRCA I. And, one of these commenters asserted that the effect of proposed Rule 13d-6(c), in tandem with the proposed amendments to Rule 13d-5, on shareholder communications could raise concerns under the First Amendment. *See* letter from Prof. Edwards, et al.; *see also supra* note 503 and accompanying text.

583 *See* letters from EIM I; SIFMA AMG.

584 *See* letter from EIM I.

585 *See* letter from Prof. Gordon.

A number of commenters made recommendations regarding proposed Rule 13d-6(c).[586] Some commenters requested that coordination with respect to Rule 14a-8 shareholder proposals be expressly made exempt.[587] Several commenters requested that coordination with respect to "vote no" campaigns be expressly made exempt.[588] Other commenters requested that it be made clear that the state of mind of one person would not be imputed to another for purposes of determining the availability of the exemption.[589] Some commenters asked that the "in connection with [any change of control] transaction" language be removed from the exemption.[590] One of those commenters stated that the "in connection with" language "might be read too broadly and have an unintended chilling effect of the sort of communications that routinely occur today."[591] Some commenters indicated that the "indirectly obligated to act" standard was in need of clearly defined boundaries and/or should be deleted.[592] One of these commenters asserted that the "indirectly obligated" standard is vague and would engender additional uncertainty, and recommended that the Commission eliminate the proposed condition that "[s]uch persons, when taking such concerted actions, are not directly or indirectly obligated to take such actions."[593]

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586 *See* letters from AFREF; Ceres; CII; IAA; ICGN; ICI I; Interfaith Center, et al.; NBG; Prof. Edwards, et al.; SSC; STB.

587 *See* letters from AFREF; Ceres; ICI I; Interfaith Center, et al.

588 *See* letters from AFREF; Ceres; CII; Interfaith Center, et al. For example, one commenter expressed support for the recommendations of another commenter that "the Commission [should] clarify the Rule 13d-6(c) exception to ensure it covers launching and participating in 'vote no' campaigns and communications with Schedule 13D filers post-filing." *See* letter from AFREF (indicating support of a corresponding recommendation in the letter from CII).

589 *See* letters from ICI I; Interfaith Center, et al.; SSC.

590 *See* letters from Ceres; CII.

591 *See* letter from CII. The commenter stated "that the positive step taken by adopting Rule 13d-6(c) could be undercut if there is a concern among investors that communicating with a Rule 13D 'group' could expose investors to being considered as a part of that 'group.'" *Id*.

592 *See* letters from Ceres; CII; ICI I.

593 *See* letter from ICI I.

One commenter stated the Commission should consider the circumstances under which investors advocating for specific changes (*e.g.*, board composition or diversity) might later be subjected to an inquiry about whether their communications or activities were protected by the exemptions given the terms in the proposal such as "solely," "only," "indirectly," "purpose," "effect," and "contemplated."[594]

In response to the Commission's solicitation for comments on proposed Rule 13d-6(d), several commenters expressed support for the proposal.[595] One commenter stated that the proposal would "help investors understand when they could become subject to regulation as a 'group' under these circumstances and avoid costly regulatory filings for activity in the ordinary course of business."[596]

Several other commenters opposed the proposed Rule 13d-6(d) exemption.[597] Some of those commenters questioned whether the proposed exemption is necessary, and implied that the proposal's inclusion in this rulemaking intimates that ordinary course of business transactions currently present risks of group formation.[598] One of those commenters said that it was fairly settled that a bilateral transaction, negotiated at arm's length, would not by itself be sufficient to create a group absent other indicia of group status such as agreements to vote and other factors.[599] Another of these commenters questioned whether this proposed provision or any explicit exemption is necessary or would instead create further uncertainty given that market

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[594] *See* letter from Prof. Edwards, et al.

[595] *See* letters from ICGN; O'Melveny & Myers; Perkins Coie.

[596] *See* letter from ICGN.

[597] *See* letters from ABA; EIM I; Engineer; Gabriel Morales, Retail Investor (Feb. 23, 2022) ("G. Morales"); IAA; ICI I; J. Kennedy; PSCM; SIFMA AMG; STB.

[598] *See* letters from ABA; ICI I; STB.

[599] *See* letter from STB.

participants have been entering into ordinary course derivatives transactions for years without treating these transactions as creating a group.[600] One commenter expressed concerns regarding potential negative collateral effects of the exemption.[601] This commenter said that proposed Rule 13d-6(d) suggests that, "outside of the safe harbor," the parties to a derivative security transaction may be deemed to form a "group" and implied that the exemption's existence would create a risk of eroding the confidence of parties to any "ordinary" securities purchase and sale transactions that they do not constitute a "group."[602]

Some commenters indicated that few dealers or market participants would be able to rely on the exemption or that it would not serve its intended purpose.[603] Another commenter similarly implied the exemption should not be adopted because "financial institutions would not just be apprehensive about, or marginally disincentivized from, entering into transactions with an activist counterparty" but instead "would avoid the risk altogether, and wholly refrain from engaging in these transactions that are economically useful and unrelated to the purposes of Section 13."[604] Another commenter echoed the concerns regarding the projected heightened level of risk arising in relation to the exemption and stated that the exemption would significantly impair ordinary-course derivatives transactions by dealers and financial institutions, even with

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600 *See* letter from ICI I.

601 *See* letter from ABA.

602 *See id*.

603 *See* letters from EIM I; IAA; STB. One of these commenters further reasoned that the exemption is arbitrary and capricious because it would treat similarly situated parties differently inasmuch as only a subset of dealer transactions may be viewed as having contributed to an activist's goals. *See* letter from EIM I.

604 *See* letter from PSCM.

counterparties who do not have any control intent.[605] A similar criticism was offered by a commenter who explained that if the proposed exemption were adopted, an implication would be created that counterparties to a derivative transaction agreement that did not qualify for the exemption would be viewed as having formed a group.[606]

Some commenters expressed doubt that proposed Rule 13d-6(d) would operate to only exempt legitimate business activity, suggesting the purpose of the proposed amendments regarding group formation and derivatives would be undermined.[607] One of these commenters said that the proposal "sounds like this is an open invitation for high profile firms to actually work together as a group without [repercussion] of regulation."[608] Another of these commenters appeared to refer to proposed Rule 13d-6(d) and expressed concern that the proposed exemption "will get taken advantage of too easily and will obscure transactions that might substantially and singlehandedly affect a security."[609] A different commenter impliedly alluded to the undermining of the proposed change to Rule 13d-5(b) and speculated that no benefit of other proposed rule changes will be received if derivative position holders can claim an exemption under a different law.[610]

3. Final Amendments

We are adopting the proposed redesignation of current Rules 13d-6 and 13d-5(b)(2) as Rule 13d-6(a) and (b), respectively, for the reasons set forth in the Proposing Release and as

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605 *See* letter from STB. The commenter added that "the uncertainty caused by proposed Rule 13d-6(d) may increase risks for market participants in otherwise established financial transactions which may inhibit such activity." *Id*.

606 *See* letter from ABA.

607 *See* letters from Engineer; G. Morales; J. Kennedy.

608 *See* letter from J. Kennedy.

609 *See* letter from Engineer.

610 *See* letter from G. Morales.

discussed above.[611] As discussed in more detail below, however, we are not adopting proposed Rule 13d-6(c) or 13d-6(d).

The Commission proposed Rule 13d-6(c) in connection with proposed Rules 13d-5(b)(1)(i) and (b)(2)(i).[612] As discussed above, we are not adopting those amendments.[613] Proposed Rule 13d-6(c) was intended to avoid potentially chilling communications among shareholders or impeding shareholders' engagement with issuers where those activities are undertaken without the purpose or effect of changing or influencing control of the issuer (and are not made in connection with or as a participant in any transaction having such purpose or effect).[614] Some commenters, however, expressed concern that the exemption would in fact have the opposite effect.[615] This concern appears to be based on their view that the exemption would be too narrow and impliedly define what actions would be sufficient to constitute "acting as a group" (*i.e.*, any actions that would not qualify for the proposed exemption).[616] To address those concerns, and in light of the fact that we are not adopting the amendments to Rule 13d-5 that prompted the proposal of the exemption in Rule 13d-6(c), we are not adopting Rule 13d-6(c). We also believe that the discussion and guidance we provided in Section II.C.1.c above will help to address the Commission's goals of preserving shareholder communications and engagement with issuers that are undertaken without the purpose or effect of changing or influencing control.

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611 *See supra* note 22 for a discussion of our redesignation of current Rules 13d-6 and 13d-5(b)(2) as Rule 13d-6(a) and (b), respectively.

612 Proposing Release at 13872.

613 *See supra* Section II.C.1.

614 Proposing Release at 13872.

615 *See supra* notes 585-591 and accompanying text.

616 *See supra* notes 582-584 and accompanying text.

Similarly, after considering the comments received regarding proposed Rule 13d-6(d),[617] we also do not believe adoption of that exemption is necessary. Under Sections 13(d)(3) and 13(g)(3), formation of a group requires that two or more persons be found to have acted as a group for the purpose of acquiring, holding, or disposing "of securities of an issuer." Many cash-settled derivatives, including those that were intended to be covered by proposed exemption, are not considered "securities of [the] issuer." Those derivatives originate with persons other than the issuer and simply reference a class of an issuer's securities. The holders of such cash-settled derivative securities are, therefore, generally not owed a fiduciary duty by the issuer and do not generally have legal standing to bring a claim against the issuer. Moreover, holders of such derivative securities are not, by virtue of those instruments, debt or equity holders of the issuer and are not entitled to a right to vote or dispose of any security "of an issuer" based on their investment in these derivatives. Absent the circumstances in which a holder of a derivative settled exclusively in cash that did not originate with the issuer could become a beneficial owner of the reference security,[618] the Commission does not believe that persons who, in the ordinary course of business, acquire derivative securities settled exclusively in cash would generally be deemed to "act as a . . . group" under Sections 13(d)(3) and 13(g)(3) with the financial institutions that sell such derivatives. Simply put, such persons cannot be found, as a matter of law, to have acquired, held, or disposed "of securities of an issuer" as that term is used in Sections 13(d)(3) and 13(g)(3).

While investors in a cash-settled equity-based derivative security, in order to acquire the derivative security, may need to enter into an agreement governing the terms of such instrument

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617 *See supra* notes 595-610 and accompanying text.

618 See *supra* Section II.B.3 for a discussion of those circumstances.

with a financial institution that, in the ordinary course of its business, acts as a counterparty to such investors, that agreement, without more, does not result in group formation. We believe that a bilateral transaction, negotiated at arm's length and entered into solely for commercial purposes, as described, would not by itself introduce facts sufficient to find that a group exists. In our view, an agreement between an investor in a cash-settled derivative security and a counterparty entered into for the ordinary course of business would fail to satisfy the "act as a . . . group" element in Sections 13(d)(3) and 13(g)(3) absent other indicia of group status such as agreements to vote or other factors.

To offset any risk exposure to that derivative security, including any obligations that may arise at settlement, the financial institution counterparty may, in practice, purchase securities in the reference covered class and hold such reference security for the duration of the agreement. While it may be true that but for the joint actions of the parties in entering into the agreement, that specific acquisition of beneficial ownership in the covered class by the financial institution would not have occurred, we believe that if the counterparty acts on its own initiative and not at the direction of the investor or otherwise on its behalf, there is no basis to assert that the investor and counterparty acted in concert and thus subjected themselves to regulation as a group. As such, entry into such an agreement will not implicate Sections 13(d)(3) and (g)(3) because the two persons cannot be viewed as acting as a group even given the financial institution's foreseeable acquisition of securities of a covered class. Assuming that the investor and the financial institution did not enter into the agreement with the purpose or effect of changing or influencing control of the issuer, the regulatory purposes of Sections 13(d) and 13(g) would not be furthered by treating the investor and the financial institution as members of a group under Section 13(d)(3) or Section 13(g)(3) solely by virtue of their entrance—for strictly commercial

purposes and not for purposes of acquiring, holding, or disposing of a covered class—into that agreement. Accordingly, we have elected not to adopt proposed Rule 13d-6(d) as the exemption is not needed in order for such ordinary course of business transactions in derivative securities to freely occur.

E. Amendment to Schedule 13D to Clarify Disclosure Requirements Regarding Derivative Securities

Schedule 13D sets forth the information that beneficial owners reporting pursuant to Section 13(d)(1) and Rule 13d-1(a) must disclose. Item 6 of Schedule 13D requires beneficial owners to "[d]escribe any contracts, arrangements, understandings or relationships (legal or otherwise) among the persons named in Item 2 [of Schedule 13D] and between such persons and any person with respect to any securities of the issuer" and sets forth a non-exclusive list of examples of such contracts, arrangements, understandings or relationships.[619] Because cash-settled derivative securities were not expressly included among these examples, questions may arise as to whether beneficial owners should report their holdings of these derivative securities as contracts "with respect to" an issuer's securities under the rationale that (1) only a purely economic, but no legal, interest is generally held through such derivatives in any class of an issuer's securities and (2) the issuer's securities are only used as a reference security. Further, as discussed below, the current requirement could be interpreted as excluding the disclosure of cash-settled options not offered or sold by the issuer, or other derivatives not originating with the issuer, including other cash-settled derivatives such as SBS.

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619 17 CFR 240.13d-101, Item 6.

1. Proposed Amendment

In the Proposing Release, the Commission proposed to amend Schedule 13D to clarify the disclosure requirements with respect to derivative securities held by a person reporting on that schedule. The Commission noted that, at present, the formulation "with respect to securities of the issuer" in Item 6 might be read to suggest that contracts, arrangements, understandings or relationships that only create economic exposure to the issuer's equity securities or are otherwise considered synthetic could be excluded.[620] Accordingly, to remove any ambiguity as to the scope of the required disclosures, the Commission proposed to revise Item 6 to expressly state that the use of derivative securities, including cash-settled SBS and other derivatives settled exclusively in cash, which use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings and relationships which must be disclosed.[621] The Commission also proposed the amendment to clarify that the derivative security need not have originated with the issuer or otherwise be part of its capital structure in order for a disclosure obligation to arise.[622] The proposed amendment thus specified that a person filing a Schedule 13D would be required to disclose interests in all contracts, arrangements, understandings, or relationships, including derivative securities, that use the issuer's equity security as a reference security.

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620 Proposing Release at 13874.

621 *Id*. To further minimize any potential ambiguity regarding what interests need to be disclosed, the Commission also proposed to eliminate the "including but not limited to" regulatory text that precedes the itemization of the instruments or arrangements covered. *Id*.

622 *Id*.

2. Comments Received

Commenters expressed various views on the proposed amendment to Item 6 of Schedule 13D. Some commenters supported the proposed amendment.[623] One commenter, which did not clearly support or oppose the proposal with respect to Item 6, appeared to indicate, in connection with a response to a request for comment with respect to Item 7, Exhibits, that Item 6 may already apply to cash-settled derivatives.[624]

Other commenters opposed the proposed amendment to Item 6 of Schedule 13D, stating that requiring disclosure of SBS arrangements in Item 6 would be confusing and indicating that it did not believe this disclosure would serve any additional purpose.[625] One commenter explained that determining which type of derivative security to include in different parts of Schedule 13D would present a logistical challenge.[626] The commenter anticipated that the compliance-related challenge would arise, from an operational point of view, because of the regulatory inconsistency created by the exclusion of SBS from the beneficial ownership calculation under proposed Rule 13d-3(e) but the inclusion of SBS under Item 6 (to the extent they use the issuer's equity security as a reference security).[627] The commenter expressed additional concern that requiring disclosure

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623 *See, e.g.*, letters from AFL-CIO; D. Pierce; Mark C.

624 *See* letter from STB. Specifically, the commenter said that the filing of the cash-settled derivative instruments as an exhibit to Schedule 13D is unnecessary because the "material terms of such arrangements . . . can be described in" Item 6. *Id*. The commenter also stated that the filing of such instruments as exhibits would present logistical difficulties if the proposed "compressed" timeframes for reporting Schedule 13D amendments are adopted. *Id*.

625 *See, e.g.*, letters from IAA; Slade Thornburg (June 25, 2023) ("S. Thornburg").

626 *See* letter from IAA.

627 *Id*. According to the commenter, "[n]ot only would this be confusing, but we do not believe such disclosure would serve any additional purpose." *Id*.

of SBS arrangements under Item 6 would negate the benefits to these holders of non-disclosure of counterparties in proposed Schedule 10B.[628]

3. Final Amendment

We are adopting the amendment to Item 6 of Schedule 13D as proposed. Specifically, we are amending Rule 13d-101 to expressly state that derivative contracts, arrangements, understandings, and relationships with respect to an issuer's securities, including cash-settled SBS and other derivatives which are settled exclusively in cash, would need to be disclosed under Item 6 of Schedule 13D in order to comply with Section 13(d)(1) and Rule 13d-1(a). We also are eliminating the "including but not limited to" language in Item 6 that currently precedes the itemization of the instruments or arrangements covered to remove any implication that additional interests may need to be disclosed.

We believe that investors could benefit from a more complete disclosure of a Schedule 13D filer's economic interests in the relevant issuer, including economic interests via positions in cash-settled derivatives. For example, disclosure of any such cash-settled derivatives may help investors evaluate whether their interests with respect to the issuer's securities are aligned with the Schedule 13D filer's. In addition, disclosure of this information is consistent with other interests required to be disclosed under Item 6, such as, for example, "division of profits or loss."

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628 *Id*. Specifically, the commenter noted that proposed "Schedule 10B . . . would not require identification of the swap counterparty" while "the instruction to Item 6 requires 'naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into.'" *Id*. Schedule 10B is a proposed disclosure statement containing information regarding large SBS positions and other information that would be required by proposed 17 CFR 240.10B-101. The Commission proposed this disclosure statement in a proposing release titled *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No. 34-93784 (Dec. 15, 2021) [87 FR 6652 (Feb. 4, 2022)] ("Schedule 10B Proposal").

Our adoption of the amendment also furthers the Congressional purpose of Section 13(d)(1), as demonstrated by the legislative history accompanying Congress' enactment of this provision.[629] The disclosures required under Item 6 of Schedule 13D originated with a Congressional mandate. Congress specified certain information within Sections 13(d)(1)(A) through (E) that beneficial owners must report once they incur a filing obligation. In addition to the disclosure required under Sections 13(d)(1)(A) through (E), Congress also authorized the Commission to require disclosure of "such additional information" it prescribes as "necessary or appropriate in the public interest or for the protection of investors."[630] Under Section 13(d)(1)(E), Congress provided that a beneficial owner must report "information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including [the] transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies."[631] Consistent with the mandate of Section 13(d)(1)(E), which forms part of the basis for the disclosure requirements of existing Item 6, this baseline disclosure requirement has existed in Schedule 13D since 1968.

We note that one commenter opposed the proposed amendment to Item 6. The commenter stated, among other things, that requiring disclosure of SBS holdings in Item 6 would be confusing.[632] Specifically, the commenter pointed out that proposed Rule 13d-3(e) would

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629 *See* Disclosure of Corporate Equity Ownership, H.R. Rep. No. 1711, at 8 (1968) ("The purpose of section 13(d) is to require disclosure of information by persons who have acquired a substantial *interest*, or increased their *interest* in the equity securities of a company by a substantial amount, within a relatively short period of time." (emphasis added)).

630 15 U.S.C. 78m(d)(1).

631 *Id*.

632 *See supra* notes 626-627 and accompanying text.

have excluded SBS and stated that there would be a "logistical challenge" associated with *excluding* SBS from the beneficial ownership calculation but *including* them in the narrative disclosure in response to Item 6.[633] We disagree. Item 6 (as well as the other items in Schedule 13D) already requires disclosure of various information that does not factor into calculating a Schedule 13D filer's beneficial ownership.[634] We do not believe that requiring disclosure in Item 6 of SBS that may be excluded from a Schedule 13D filer's beneficial ownership calculation would present any unique complications or be more complex than disclosure of this other information, and the commenter did not present any specific "logistical challenges" that could arise from this requirement. Moreover, we are not adopting proposed Rule 13d-3(e),[635] further diminishing this concern about potential confusion.

The commenter also noted that the proposed amendment to Item 6 would be unnecessary in light of, and could conflict with, the disclosure of SBS positions in proposed Rule 10B-1.[636] While the Commission will consider concerns about a potential conflict if it takes any final action with respect to proposed Rule 10B-1, we note that proposed Rule 10B-1 (along with proposed Schedule 10B) is intended to serve a purpose different from Item 6 of Schedule 13D.

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633 *See id*.

634 For example, Item 6 requires a description of "any contracts, arrangements, understandings or relationships . . . with respect to any securities of the issuer, including . . . puts or calls." 17 CFR 240.13d-101, Item 6. If any such "puts or calls" include call options with respect to the issuer's covered class that are not exercisable within 60 days (and were not acquired with a change of control purpose or effect), then they would be required to be disclosed in response to Item 6, but they would not factor into the Schedule 13D filer's beneficial ownership. *See* Rule 13d-3(d)(1)(i). Similarly, Item 4(a) of Schedule 13D requires a description of "any plans or proposals which the reporting persons may have which relate to or would result in . . . [t]he acquisition by any person of additional securities of the issuer, or the disposition of securities of the issuer." 17 CFR 240.13d-101, Item 4(a). Although such plans for potential future acquisitions or dispositions of securities of the issuer could, if consummated, result in changes to the Schedule 13D filer's beneficial ownership, they generally would not factor into the beneficial ownership amount reflected in the Schedule 13D filing in which such plans are disclosed.

635 *See supra* Section II.B.3.

636 *See supra* note 628 and accompanying text.

The Commission proposed Rule 10B-1 to, among other things, provide market participants (including counterparties, issuers, and issuers' stakeholders) and regulators with access to information that may indicate that a person (or a group of persons) is building up a large SBS position, and to alert market participants and regulators to the existence of concentrated exposures to a limited number of counterparties, which should inform those market participants and regulators of the attendant risks, allow counterparties to risk manage and lead to better pricing of the SBS with respect to transactions with persons holding large positions in those SBS (as a result of all market participants having access to the information about the positions).[637] Item 6 of Schedule 13D, on the other hand, is intended to implement Section 13(d)(1)(E), where Congress specifically mandated that the disclosure statement filed would include information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including the names of relevant parties, as part of its intent to require disclosures to security holders regarding persons with significant holdings. Thus, in light of that Congressional mandate, we believe it is appropriate to require disclosure of such information pursuant to Item 6 of Schedule 13D.

F. Structured Data Requirement for Schedules 13D and 13G

Currently, the EDGAR Filer Manual requires Schedules 13D and 13G to be filed electronically on the Commission's EDGAR system in HTML or ASCII format.[638] HTML and

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637 *Prohibition Against Fraud, Manipulation, or Deception in Connection with Security-Based Swaps; Prohibition against Undue Influence over Chief Compliance Officers; Position Reporting of Large Security-Based Swap Positions*, Release No. 34-93784 (Dec. 15, 2021) [87 FR 6652, 6667, 6678 (Feb. 4, 2022)].

638 EDGAR Filer Manual (Volume II) version 67 (Sept. 2023) ("EDGAR Filer Manual"), at 5-1 (requiring EDGAR filers generally to use ASCII or HTML for their document submissions, subject to certain exceptions). Schedule 13D and 13G filers are required, by rule, to comply with the requirements of the EDGAR Filer Manual. *See* 17 CFR 232.301 ("Filers must prepare electronic filings in the manner prescribed by the EDGAR Filer Manual, promulgated by the Commission, which sets forth the technical formatting requirements for electronic submissions.").

ASCII are both unstructured data languages; thus, the disclosures reported on Schedules 13D and 13G are not currently machine-readable.[639] As a result, information disclosed on Schedules 13D and 13G is generally more difficult for investors and other market participants to access, compile, and analyze as compared to information that is submitted in a machine-readable data language.

While the majority of EDGAR filings under the Commission's rules are submitted in HTML or ASCII, certain EDGAR filings are submitted using machine-readable, XML-based languages that are each specific to the particular EDGAR document type being submitted.[640] This includes filings that, like Schedules 13D and 13G, are submitted by individuals and entities other than the registrant of the class of securities.[641] For these EDGAR XML filings, filers are typically provided the option to either submit the filing directly to EDGAR in XML, or manually input their disclosures in a fillable web form as part of an online web application developed by the Commission that converts the completed form into an EDGAR-specific XML document.

1. Proposed Amendment

In the Proposing Release, the Commission proposed to require that beneficial ownership reports on Schedules 13D and 13G be filed using a structured, machine-readable data language. In particular, the Commission proposed to require that Schedules 13D and 13G be filed in part using an XML-based language specific to Schedules 13D and 13G ("13D/G-specific XML").[642]

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639 The term "machine-readable" is defined in 44 U.S.C. 3502 as "data in a format that can be easily processed by a computer without human intervention while ensuring no semantic meaning is lost."

640 *See* Securities and Exchange Commission, Current and Draft Technical Specifications, *available at* https://www.sec.gov/edgar/filer-information/current-edgar-technical-specifications.

641 Examples include the Section 16 beneficial ownership reports (Form 3, 4, and 5) and Form 13F. *See id*.

642 The Commission noted that this would be consistent with the approach used for other XML-based structured data languages created by the Commission for certain EDGAR Forms, including the data languages used for reports on each of Form 13F, Form D and the Section 16 beneficial ownership reports (Forms 3, 4, and 5). Proposing Release at 13874, n. 154.

For both Schedules, all disclosures, including quantitative disclosures, textual narratives, and identification checkboxes, would be structured in 13D/G-specific XML under the proposal, with the exception of the exhibits to the Schedules, which would remain unstructured. The Commission stated that a structured data requirement for the disclosures reported on Schedules 13D and 13G would greatly improve the accessibility and usability of the disclosures, allowing investors to access, aggregate and analyze the reported information in a much more timely and efficient manner.[643]

2. Comments Received

Commenters largely supported the proposed structured data requirement for Schedules 13D and 13G.[644] Other commenters objected to the proposed structured data requirement for Schedules 13D and 13G, with one commenter expressing concern that the proposed structured data requirement would be unduly burdensome for small beneficial owners.[645]

Some of the supporting commenters asserted that the proposed structured data requirement would improve the fairness and transparency of the markets.[646] One commenter asserted that the proposal would be a fundamental step toward ensuring that the beneficial ownership reporting requirements remain modern and comprehensible.[647] One commenter noted

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643 *Id*. at 13875. These considerations are generally consistent with objectives of the Financial Data Transparency Act of 2022, which directs the establishment by the Commission and other financial regulators of data standards for collections of information. Such data standards must meet specified criteria relating to openness and machine-readability and promote interoperability of financial regulatory data across members of the Financial Stability Oversight Council. *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. 117-263, tit. LVIII, 136 Stat. 2395, 3421-39 (2022).

644 *See, e.g.*, letters from Aaron Leonard (June 28, 2023); Anonymous 12; Benjamin Ng (Feb. 21, 2022) ("B. Ng"); Convergence; David Kraft (June 26, 2023); FundApps; HMA I; IAA; ICI I; J. Kennedy; J. Pieper; J. Soucie; Mike Slavens, Retail Investor and Mechanical Engineer (Feb. 19, 2022) ("M. Slavens"); Mark C.; P. Worts; Todd; XBRL US (Apr. 11, 2022) ("XBRL").

645 *See, e.g.*, letter from A. Day; *see also* letters from B. Mason; S. Thornburg.

646 *See* letters from Anonymous 12; J. Kennedy; M. Slavens.

647 *See* letter from B. Ng.

that the proposed structured data requirement would not impose significant costs to beneficial owners of more than five percent of a covered class and stated that the requirement would allow the Commission to make use of advancing technologies in order to reduce costs to taxpayers and more speedily provide the public with the information it needs to accurately assess the conditions of the market.[648] Another commenter asserted that the proposal would enable the Commission to process filings instantaneously and therefore allow for real-time analysis and if necessary, remedial action and stated that any data which cannot be easily processed by machines will become largely useless as the century progresses.[649] In addition, one commenter agreed with the Commission that tagging the data reported on Schedules 13D and 13G will make it easier for investors and other market participants to access, compile, and analyze this information and expressly supported the Commission's development of electronic "style sheets" that, when applied to the reported XML data, would represent that data in "human readable" format.[650]

Some of the supporting commenters also made recommendations to the Commission regarding the proposed structured data requirement. One commenter requested that the Commission release the taxonomy at least six months in advance of the date by which any revised Schedules 13D or 13G must be filed so that reporting persons can incorporate the taxonomy into their filing system.[651] Similarly, other commenters recommended that the Commission provide for a test period in which reporting persons can make test filings using the taxonomy in advance of the date by which the revised schedules must be filed.[652] Finally, one

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648 *See* letter from J. Soucie.

649 *See* letters from Convergence; FundApps.

650 *See* letter from ICI I.

651 *Id*.

652 *See* letters from IAA; ICI I.

commenter suggested that the Commission opt for the XBRL data language, rather than creating an XML schema designed specifically for beneficial ownership reporting as proposed.[653]

3. Final Amendment

We are adopting the structured data requirement for Schedules 13D and 13G as proposed. Specifically, we are replacing the current HTML or ASCII requirement for Schedules 13D and 13G in the EDGAR Filer Manual with a requirement to use 13D/G-specific XML for the disclosures reported on those Schedules.[654] As is the case with other EDGAR XML filings, reporting persons will be able to, at their option, submit filings directly to EDGAR in 13D/G-specific XML or use a web-based reporting application developed by the Commission that will generate the Schedule in 13D/G-specific XML in connection with the submission of the filing to EDGAR.[655]

In adopting the structured data requirement as proposed, we note that commenters overwhelmingly supported the proposal.[656] Although one commenter opposed the proposed structured data requirement on the basis that it would be unduly burdensome for small beneficial owners,[657] we believe the web-based reporting application that will generate the Schedule in

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653 *See* letter from XBRL. The commenter asserted that, among other purported benefits, an XBRL-based standard will result in significantly lower costs and efficiencies across both reporting entities and data users, consistent datasets that can be easily commingled with other datasets, and enhanced validation capabilities to improve data quality. *Id*.

654 Section 13(g)(5) of the Exchange Act provides, in part, that "the Commission shall take such steps as it deems necessary or appropriate in the public interest or for the protection of investors . . . to tabulate and promptly make available the information contained in any report filed pursuant to this subsection in a manner which will, in the view of the Commission, maximize the usefulness of the information to . . . the public." 15 U.S.C. 78m(g)(5). The requirement proposed in this section would be consistent with this mandate. Although this statutory language applies only to beneficial ownership reports filed pursuant to Section 13(g)—*i.e.*, a Schedule 13G filed by an Exempt Investor—we believe these public benefits would be furthered by applying the requirement proposed in this section to all Schedule 13D and 13G filers.

655 In addition, the Commission's staff intends to develop electronic "style sheets" that, when applied to the reported XML data, will represent that data in human-readable form on EDGAR.

656 *See supra* Section II.F.2.

657 *See supra* note 645 and accompanying text.

13D/G-specific XML should serve to reduce the burden of preparing a Schedule 13D or 13G for small beneficial owners (and other Schedule 13D and 13G filers), as compared to the current system whereby beneficial owners generally use third-party software to prepare their Schedule 13D or 13G.[658] In addition, because 13D/G-specific XML lends itself more readily to the development of a web-based reporting application on EDGAR than XBRL does, we believe 13D/G-specific XML is more suitable than XBRL for structuring Schedules 13D and 13G.[659] In response to commenters requesting a test period for the revised Schedules and requesting a taxonomy (*i.e.*, schema) release at least six months before compliance is required, we are providing an extended voluntary compliance period during which the schema will be publicly available.[660] The compliance period is discussed in further detail in Section II.G below.

G. Compliance Dates

The Commission did not propose a transition period for any of the Proposed Amendments. Some commenters suggested, however, that the Commission should provide for an extended compliance period with respect to the proposed structured data requirement for Schedules 13D and 13G.[661] Based on this feedback, we believe that an extended transition period for compliance with the structured data requirement is appropriate. As such, compliance with the structured data requirement for Schedules 13D and 13G will not be required until December 18, 2024. We welcome, however, early compliance with this requirement, and Schedule 13D and

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658 For example, this web-based reporting application will contain and prompt a beneficial owner to respond to the Schedule 13D and 13G disclosure requirements, as set forth in Rules 13d-101 and 13d-102, respectively, which should make the preparation process more streamlined and convenient.

659 *See also infra* Section IV.D.3.

660 *See supra* notes 651-652 and accompanying text.

661 *See id*.

13G filers may begin to voluntarily comply with the structured data requirement on December 18, 2023.

In order to further reduce some of the potential burdens that commenters described, compliance with the revised Schedule 13G filing deadlines under Rules 13d-1 and 13d-2 will not be required before September 30, 2024. Thus, notwithstanding the fact that the final amendments will become effective on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], beneficial owners will continue to be required to comply with the current Schedule 13G filing deadlines through September 29, 2024. Beginning on September 30, 2024, however, beneficial owners will be required to comply with the revised Schedule 13G filing deadlines. For example, under Rule 13d-2(b), as amended, a Schedule 13G filer will be required to file an amendment within 45 days after September 30, 2024 if, as of end of the day on that date, there were any material changes in the information the filer previously reported on Schedule 13G.

III. Other Matters

If any of the provisions of these amendments, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or the application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these amendments a “major rule,” as defined by 5 U.S.C. 804(2).

IV. Economic Analysis

A. Overview

As discussed in Section II, the final amendments generally shorten the filing deadlines for initial Schedule 13D and 13G filings, together with other changes described below. These filings are required in accordance with Sections 13(d) and 13(g) of the Exchange Act. Section 13(d) was enacted in 1968 with the intent to alert issuers and the marketplace to rapid accumulations of equity securities by persons who would then have the potential to change or influence control of the issuer.[662] Section 13(g), subsequently enacted in 1977, was intended, together with Section 13(d), to provide a "comprehensive disclosure system of corporate ownership" applicable to all persons who are the beneficial owners of more than five percent of a covered class.[663]

The efficiency of financial markets rests on material information becoming public in a timely fashion. In addition to protecting investors, greater availability of information allows securities prices to better reflect their issuers' fundamental value, and ultimately promotes capital formation. The widespread enactment of laws and regulations that restrict the use of information obtained by virtue of insider status, as well as regulations that restrict selective disclosure to certain persons in the absence of public disclosure, point to the public-good nature of rules requiring public disclosure.

This same principle motivates the requirement to disclose beneficial ownership of significant shareholders with the potential to change or influence control of the issuer. Knowledge of who is influencing control is highly material.[664] Investors benefit from this

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662 *See* H.R. Rep. No. 1711, at 8 (1968).

663 *See* S. Rep. No. 114, at 14 (1977).

664 For the purpose of this economic analysis, the term "significant shareholders" is used to represent persons with a large shareholding in a particular issuer. The terms "blockholders" and "significant stockholders" were used to represent such persons in the Proposing Release.

information just as they benefit from material information regarding their investments more broadly. The five-business day deadline balances the interest of investors to be in possession of material information with the interest of investors seeking changes in control that may benefit shareholders, and is longer than the filing deadline for other settings involving ownership changes, such as for Form 4 under Exchange Act Section 16 reporting.[665]

Moreover, as we discuss below, studies suggest that traders other than the filer may be in a position to become aware of a potential activist campaign and buy stock of the target issuer immediately prior to a Schedule 13D filing, thereby benefiting directly from foreknowledge of the filing rather than their own efforts.[666] Shortened filing deadlines may lessen the opportunity for these traders to gain such an advantage, as discussed below, which could enhance trust in markets and thereby capital formation. Finally, shortening the deadline is expected to reduce overall informational asymmetries in the market. Both theoretical and empirical studies have connected information asymmetry, and in particular the presence of informed traders, to wider bid-ask spreads.[667] We therefore expect shortening the initial Schedule 13D filing deadline to improve liquidity.[668]

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665 Some commenters indicated that the Commission failed to appropriately justify the shortened filing deadlines or identify an associated market failure, or stated that the information asymmetry between a filer and the market is not a market failure or otherwise problematic. *See, e.g.*, letters from AIMA; EIM I; IAA; ICM; Profs. Bishop and Partnoy I; Profs. Eccles and Rajgopal; Profs. Swanson, Young, and Yust; SIFMA; SIFMA AMG; TIAA. We agree that the initial information asymmetry between a prospective filer and the market is not a market failure because in its absence, the filer may not be sufficiently rewarded for the expenses of its efforts expended in information acquisition and in pursuing changes at the issuer, which often have market-level benefits. Nevertheless, an earlier resolution of this information asymmetry is expected to have the benefits discussed in this economic analysis.

666 *See infra* Section IV.C.1.a.iii.

667 *See infra* Section IV.C.1.a.iv.

668 *See id.*

Shortening the initial Schedule 13D filing deadline will have costs. Specifically, activist investors will have less time in which to accumulate shares before the filing deadline and, therefore, before the price of the stock reflects their plans. This may reduce their expected profit, and accordingly some of the incentives for activism. However, although we cannot predict with precision the magnitude of the ultimate effect on activism and how the overall markets and activists themselves will respond to these changes, we believe it is likely that the shortened deadline will not significantly reduce the level of activism as we expect most campaigns will not be affected by the amended deadline, based on our analysis of historical campaigns, and most activists will have ability to adapt to the shortened deadline through various alternatives.

We are also, among other things, revising the filing deadlines for Schedule 13D and 13G amendments and amending Item 6 of Schedule 13D, which requires the disclosure of certain contracts, arrangements, understandings, and relationships, to remove any implication that a person is not required to disclose interests in all derivative securities that use a covered class as a reference security. Each of these final amendments may allow investors and other market participants to make better-informed decisions by accelerating the disclosure of information or expanding the amount of information disclosed. The final amendments also require that Schedule 13D and Schedule 13G be filed using a structured, machine-readable data language, which may facilitate the extraction and analysis of information in the filings, and make technical changes to Regulation S-T associated with extending the filing "cut-off" time from 5:30 p.m. to 10 p.m., which may ease the compliance costs for filers.

We are mindful of the costs and benefits of the final amendments.[669] Below, we discuss in more detail the economic effects of the final amendments, including their anticipated costs and benefits and, integrated into that discussion, the likely effects of the final rules on efficiency, competition, and capital formation.[670] We also analyze the potential costs and benefits of significant alternatives to the final amendments.

B. Baseline

The baseline against which the costs, benefits, and the effects on efficiency, competition, and capital formation of the final amendments are measured consists of the current state of the market and the current regulatory framework. The economic analysis considers existing regulatory requirements, including recently adopted rules, as part of its economic baseline against which the costs and benefits of the final amendments are measured.[671]

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669 Section 3(f) of the Exchange Act [17 U.S.C. 78c(f)] requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. Further, Section 23(a)(2) of the Exchange Act [17 U.S.C. 78w(a)(2)] requires the Commission, when making rules under the Exchange Act, to consider the impact that the rules would have on competition, and prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the Exchange Act.

670 Several commenters raised concerns about the Proposing Release's discussion of potential effects on efficiency, competition, and/or capital formation. *See, e.g.*, Craig Lewis, *Review of the Economic Analysis for Proposed Rule Amendments to Modernize Beneficial Ownership Reporting*, exhibit to letter from EIM I ("Lewis Study I (exhibit to letter from EIM I)") (stating that the discussion of efficiency, competition, and capital formation in the Proposing Release "appears to be an afterthought and glosses over or fails to address many important points"); *see also* letters from AIMA; B. Sharfman; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II. Our analysis of potential effects on efficiency, competition, and capital formation has been revised and expanded from the Proposing Release and has been integrated into the discussion of the benefits and costs of the final amendments.

671 *See, e.g.*, *Nasdaq v. SEC*, 34 F.4th 1105, 1111-15 (D.C. Cir. 2022). This approach also follows Commission staff guidance on economic analysis for rulemaking. *See* Staff's "Current Guidance on Economic Analysis in SEC Rulemaking" (Mar. 16, 2012), *available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf ("The economic consequences of proposed rules (potential costs and benefits including effects on efficiency, competition, and capital formation) should be measured against a baseline, which is the best assessment of how the world would look in the absence of the proposed action."); *Id.* at 7 ("The baseline includes both the economic attributes of the relevant market and the existing regulatory structure."). The best assessment of how the world would look in the absence of the proposed or final action typically does not include recently proposed actions, because that would improperly assume the adoption of those proposed actions.

1. Current Schedule 13D and 13G Filing Requirements

The current Schedule 13D and Schedule 13G filing requirements are discussed in detail in Section II.A above.[672] Briefly, an initial Schedule 13D is currently required to be filed within 10 days after any acquisition of beneficial ownership of a covered class that results in a person directly or indirectly being the beneficial owner of more than five percent of the covered class. Among other disclosures, the reporting person must describe, pursuant to Item 6 of Schedule 13D, any contracts, arrangements, understandings, or relationships among the reporting persons or between the reporting persons and any other person with respect to any securities of the issuer. In addition, a Schedule 13D amendment must be filed "promptly" upon any material change in the facts reported in the Schedule 13D filing, inclusive of any amendments thereto.[673]

The initial filing deadline for the initial Schedule 13G varies by investor category. QIIs and Exempt Investors must file an initial Schedule 13G within 45 days after the end of the calendar year in which their beneficial ownership exceeds five percent of a covered class at the end of the last day of that calendar year. Further, if a QII beneficially owns more than 10 percent

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672 Other disclosure requirements may also apply to significant shareholders. For example, persons deemed beneficial owners of more than 10% of any class of equity securities (other than certain exempted securities) registered under Exchange Act Section 12 are also considered to be insiders for the purpose of Exchange Act Section 16 and subject to the associated disclosure requirements. For example, these persons must file with the Commission an initial report on Form 3 either within 10 days after becoming an insider of an issuer that already has a class of equity securities registered under Section 12, or upon the issuer's initial registration of the class of equity security under Section 12. 15 U.S.C. 78p(a)(2)(A)-(B). Also, acquisitions of ownership stakes exceeding certain dollar thresholds trigger the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Pub. L. 94–435, 90 Stat. 1383 (1976) as administered by the Federal Trade Commission and Department of Justice. In general, we do not expect these additional disclosure requirements to significantly affect the costs and benefits of the final rules.

673 As noted *supra* in Section II.A.3 the Commission has expressed that under the current standard, "[a]ny delay beyond the date the filing reasonably can be filed may not be prompt" and an amendment to a Schedule 13D reasonably could be filed in as little as one day following the change (citing *In re Cooper Laboratories,* Release No. 34-22171 (June 26, 1985)). Some commenters indicated that the requirement for Schedule 13D amendments to be made "promptly" has generally been understood to mean within two business days. *See* letters from EIM I; IAA.

of a covered class as of the last day of any month, then the initial Schedule 13G must be filed within 10 days after the end of that month. Passive Investors must file an initial Schedule 13G within 10 days of acquiring beneficial ownership of more than five percent of a covered class.

For all Schedule 13G filers, if, as of the end of the calendar year, there are any changes in the information previously reported in a Schedule 13G filing, a Schedule 13G amendment must be filed within 45 days after the end of that calendar year. In addition, QIIs must file a Schedule 13G amendment within 10 days after the end of the first month in which their beneficial ownership either exceeds 10 percent of a covered class, or, once across that threshold, increases or decreases by more than five percent of the covered class. Similarly, Passive Investors must "promptly" file a Schedule 13G amendment upon acquiring beneficial ownership of more than 10 percent of a covered class, or, once across that threshold, if they increase or decrease their beneficial ownership by more than five percent of the covered class.

2. Market Trends

There have been significant changes in the technological, financial market, and regulatory environment since the enactment of the Williams Act.[674] In particular, various new technologies developed over this time period facilitate the filing process, including both the preparation and submission of a filing. For example, communications have become easier and faster over this time, facilitating the gathering of information to be disclosed and any necessary

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674 *See* Proposing Release at 13851. Several commenters identified trends that were not discussed in the Proposing Release or indicated that the economic analysis in the Proposing Release could have been enhanced by considering additional evidence regarding changes over time. *See* letters from Charlie Penner and Bob Eccles (Apr. 12, 2022) ("C. Penner and Prof. Eccles"); CIRCA I; CIRCA IV; ICM; Prof. Gordon; PSCM; SCG; Lewis Study I (exhibit to letter from EIM I) (requesting "evidence that efficiency enhancements have increased the pace at which investors build beneficial ownership positions"). In response to these comments, this discussion has been expanded relative to the discussion in the Proposing Release with respect to changes since the enactment of the Williams Act. *See supra* notes 138-141 and accompanying text.

coordination among parties. Further, information technologies used to compile the necessary data and prepare and transmit filings may have helped to reduce the time required to produce and submit filings. Also, electronic submission relieves filers of the need to mail or hand deliver filings. On the other hand, as some commenters noted, some of the tasks necessary for filers' preparation and submission of filings have not been automated or otherwise accelerated.[675] Further, as one commenter noted, information technologies have also facilitated easier and faster access to filings, which may reduce the time for the information in filings to reach market participants even under the same deadline.[676] Modern information technologies and the faster pace of communication may also allow investors and other market participants to react more quickly to disclosures, such that they may benefit more from disclosures being made a few days earlier than they might have in earlier decades, when decision-making may have proceeded at a slower pace.

In addition to the ease of communication, the introduction of electronic trading, new types of financial contracts and instruments, and advances in order-splitting and other trade execution optimization techniques, as well as the rise of dark pools,[677] may facilitate an investor accumulating a large equity stake more quickly than at the time of the enactment of the Williams Act. On the other hand, we also recognize that accumulating significant ownership could instead be more difficult in the face of modern algorithmic and high-frequency trading, more sophisticated surveillance of equity trading and ownership by other traders, market participants,

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675 *See infra* notes 866-867 and accompanying text.

676 *See* letter from CIRCA IV.

677 *See* letter from SCG. A dark pool is a private forum for trading securities. *See also Order Competition Rule*, Release No. 34-96495 (Dec. 14, 2022) [88 FR 128 (Jan. 3, 2023)] (for further discussion on dark pools).

and issuers,[678] and the defenses and tactics currently used by issuers with respect to potential unsolicited takeover bids or shareholder activism.[679]

At least one study presents evidence that, despite variations in the number of filings from month to month and from year to year, the absolute number of initial or total Schedule 13D filings made per year did not increase overall from 1985 to 2012.[680] Commission staff analysis of more recent filings supports the observation that the number of total filings made per year has not increased over recent decades; in fact, the number of Schedule 13D filings has decreased somewhat in the most recent decade.[681] Further, according to academic research examining different time periods and subsets of filings from 1985 through 2018, there has been no significant change in the average level of beneficial ownership of a covered class reported in

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678 *See* letter from ICM.

679 Researchers have found that the increased use of low-threshold poison pills within the last decade or two could increase the difficulty of accumulating an equity stake beyond a certain size. *See, e.g.*, Ofer Eldar et al., *The Rise of Anti-Activist Poison Pills* (Working Paper, Jan. 2023), *available at* https://ssrn.com/abstract=4198367; Nicole Boyson & Pegaret Pichler, *Hostile Resistance to Hedge Fund Activism*, 32 REV. FIN. STUD. 771 (2019) ("Boyson & Pichler 2019 Study"). Commenters discussed an increased use of poison pills as well as a more general increase in anti-takeover or "anti-activist" defenses. *See* letters from CIRCA I; EIM III; ICM; Prof. Gordon; PSCM.

680 *See, e.g.*, Ulf von Lilienfeld-Toal & Jan Schnitzler, *What is Special About Hedge Fund Activism? Evidence from 13-D Filings*, Swedish House of Fin. Rsch. Paper No 14-16 (June 4, 2014), *available at* https://ssrn.com/abstract=2506704 ("Lilienfeld-Toal and Schnitzler 2014 Study") (plotting, in Figure 1 therein, the number of initial and total Schedule 13D filings per month from 1985 through 2012, and demonstrating substantial month-to-month variation and a slight overall downward trend overall in initial and total Schedule 13D filings).

681 Staff reviewed the number of Schedule 13D and 13D/A filings on EDGAR each year from 1997 (the first full year after the phase-in of electronic filing was complete) through 2022, available at https://www.sec.gov/dera/data/dera_edgarfilingcounts, and found no clear trend in the number of these filings per year over the last decade, but found that the rate of Schedule 13D filings over the last decade was somewhat lower than the rate in the earlier part of the sample period. For example, for the years 1997 through 2010, the average number of filings per year were approximately 2,800 and 5,200 for initial and amended Schedule 13D filings respectively, which are generally consistent with the monthly rates of filings reported for 1985 through 2012 in the Lilienfeld-Toal and Schnitzler 2014 Study. In contrast, for the years 2011 through 2022, the average number of filings per year were roughly 1,400 and 4,100 for initial and amended Schedule 13D filings respectively. This decline is roughly commensurate with the decline in the number of publicly listed companies. Staff also reviewed the number of Schedule 13G filings on EDGAR each year from 1997 through 2022, from the same source, and found no clear trend in the number of such filings per year over this period.

individual initial Schedule 13D filings over that time horizon.[682] Commission staff analysis of more recent filings supports the observation that the average level of beneficial ownership reported in initial Schedule 13D filings has not meaningfully changed in recent decades.[683]

There is also research that addresses whether other developments may have changed the significance of lower ownership stakes in an issuer's securities over time. For example, some observers have stated that the increase in stock ownership by institutional investors, the rise of proxy advisory services,[684] and regulatory and legal developments regarding shareholder communications may have made it easier for an investor with a lower ownership stake to influence other shareholders, and, ultimately, the issuer.[685] On the other hand, others have stated that the increased presence of institutional investors may make it more difficult for an investor with a lower ownership stake to exert control, without the support of these institutional investors.[686] Overall, it is unclear whether regulatory, legal, and market developments have led

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682 *See, e.g.*, Lilienfeld-Toal and Schnitzler 2014 Study (based on data from all Schedule 13D filings from 1985 through 2005, including data from paper filings obtained via Thomson Research); Lucian Bebchuk et al., *Pre-Disclosure Accumulations by Activist Investors: Evidence and Policy*, 39 J. CORP. L. 1, 14-17 (2013) ("Bebchuk et al. 2013 Study") (based on data from Schedule 13D filings by hedge funds from 1994, the advent of electronic trading, through 2007). Subsequent research on more recent samples of Schedule 13D filings by hedge funds shows reported average ownership levels consistent with the Bebchuk et al. 2013 Study. *See, e.g.*, Alon Brav et al., *Governance by Persuasion: Hedge Fund Activism and Market-Based Shareholder Influence*, OXFORD RSCH. ENCYCLOPEDIA OF ECON. AND FIN. (2022) ("Brav et al. 2022 Study") (based on data from Schedule 13D filings by hedge funds from 1994 through 2018).

683 See Sections IV.B.3.a.i and ii below for details on the filings analyzed by staff.

684 Proxy advisory firms (or proxy voting advice businesses) provide voting services that can help shareholders, primarily investment advisers and institutional investors, manage their substantive and procedural proxy voting needs with respect to the public companies they own, including assisting these shareholders in making their voting determinations on behalf of their own clients and handling other aspects of the voting process. *See, e.g.*, *Exemptions from the Proxy Rules for Proxy Voting Advice*, Release No. 34-89372 (July 22, 2020) [85 FR 55082 (Sept. 3, 2020)].

685 *See, e.g.*, John C. Coffee, Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 553-71 (2016); *see also* letter from SCG (stating that "activists today have more resources, often win the support of highly influential proxy advisors, can readily share their views on financial news networks, and have access to … modern financial instruments that they can use to postpone disclosure").

686 *See, e.g.*, Ian Appel et al., *Standing on the Shoulders of Giants: The Effect of Passive Investors on Activism*, 32 REV. FIN. STUD. 2720 (2019) ("Appel et al. 2019 Study").

activist campaigns by investors with lower ownership stakes to become more or less effective over time.[687] That said, researchers have noted that today's market for corporate control, in contrast to that at the time of the enactment of the Williams Act and the Commission's original adoption of the related rules, prominently features investors with minority interests in issuers who seek to influence these issuers' governance or corporate policies by convincing other shareholders to support their causes instead of pursuing direct control of issuers through majority ownership.[688]

3. Affected Parties and Current Market Practices[689]

The parties affected by the final amendments include: all investors that are required or potentially required to report their beneficial ownership of covered classes on Schedules 13D and 13G; the issuers of covered classes; shareholders of these issuers who are not Schedule 13D or 13G filers; and other investors, market participants, and issuers. Below we provide information

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687 It is difficult to measure how the effectiveness of activist campaigns may have changed over time because, among other things, the outcomes of campaigns are heterogeneous and thus difficult to compare, the costs of most campaigns are not observable, and the threat of a campaign can have significant effects without being associated with an observable campaign. Commenters expressed mixed views on whether activist campaigns have become more or less effective over time. *See, e.g.*, letters from WLRK II (describing an "increasing effectiveness of activist campaigns and their decreased cost"); Profs. Bishop and Partnoy I (stating that "the impact that shareholder activists are having on corporate America is modest and in decline" and citing a practitioner study "describing the number of board seats secured by activists as 'lower than in recent years'" and "describing the number of activist campaigns in 2021 as 'in line with 2020's slower pace'").

688 *See, e.g.*, Brav et al. 2022 Study; *see also* letter from Profs. Bishop and Partnoy I (stating that "public company boards are no longer monitored by hostile takeovers, so activism is the remaining recourse").

689 Commenters specifically suggested the Commission consider the interaction between the final amendments and the Short Position Reporting Proposal, its proposal relating to the reporting of securities loans, and the security-based swap reporting portion of the Schedule 10B Proposal. *See* letters from Profs. Bishop & Partnoy I; EIM IV at 4-5; ICI II at 7 n. 13; *see also Reporting of Securities Loans*, Release No. 34-94315 (Feb. 25, 2022) [87 FR 11659]. These proposals, or portions of proposals, have not been adopted and thus have not been considered as part of the baseline here. To the extent those proposals or portions of proposals are adopted in the future, the baseline in those subsequent rulemakings will reflect the regulatory landscape that is current at that time.

about the current nature of Schedule 13D and Schedule 13G filings and filers, which has not changed markedly since publication of the Proposing Release.

a. Schedule 13D Filings

i. Number of Filings, Filer Types, and Time to File

During calendar year 2022, the Commission received a total of 5,179 Schedule 13D filings, including 1,161 initial filings and 4,018 amendments.[690] Overall, these initial filings and amendments involved 2,194 unique lead filers.[691] Additional details specific to the initial filings, including their breakdown and characteristics by filer type, are presented in Table 1.[692]

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690 These estimates are based on staff analysis of EDGAR filings. The Proposing Release reported that the Commission received 10,542 Schedule 13D filings (2,288 initial filings and 8,254 amendments) in calendar year 2020. As noted in the DERA Memorandum, based on further staff review of these reported statistics, we believe they included duplicate records, and that the actual number of unique Schedule 13D filings received in 2020 was 5,288 filings (1,148 initial filings and 4,140 amendments), which is similar to the counts provided for 2022 above. One commenter addressing the DERA Memorandum questioned whether data pertaining to other filing years used in the analyses in that memorandum include "similar double counting." *See* letter from EIM IV. Staff reviewed to verify that duplicate records were not included in the statistics and analyses in the DERA Memorandum or in this economic analysis.

691 This estimate is based on staff analysis of EDGAR filings. "Lead filer" indicates the filer that submits a filing to the Commission, though the same filing may include information about additional co-filers and their beneficial ownership of securities.

692 These estimates are based on staff analysis of EDGAR filings. The "Prominent Activists" category is based on the classification of the filer as either (or both) (i) a member of the Insightia (previously Activist Insight) "Activist Top Ten" list in any of the 10 years (2014 to 2023) that this list has been published, which represent Insightia's ranking of the most influential activists over the past year, based on the quantity, size, and performance of their activist investments; or (ii) a "Sharkwatch 50" activist in the FactSet SharkRepellent database as of 2021, which represents FactSet's compilation of the 50 most significant activists based on, *e.g.*, the number and impact of their campaigns as of that date. The "Other Institutions" category is based on filings by institutions (primarily partnerships, corporations, investment advisors, and banks) that do not fall in the "Prominent Activist" category. The "Other Individuals" category is based on filings that report holdings of individuals and no other filer type and that do not fall in the "Prominent Activist" category; filings that report holdings of individuals who are co-filing as affiliates or part of a group with institutions (none of whom fall in the "Prominent Activist" category) are included in the "Other Institutions" category. Information about the number of days from the trigger date to the filing date of the Schedule 13D and the beneficial ownership percentage reported in the Schedule 13D, respectively, are based on a subset of filings (about 98% of the filings) for which we were able to extract the required information. The "median ownership reported in filing" row represents the median, across filings, of the maximum beneficial ownership percentage separately reported in a filing and may thus understate the aggregate ownership of a group of co-filers. Based on hand-collection of aggregate ownership in a random subsample of 2021 filings, we estimate that this approach does not fully aggregate all of the ownership

Table 1

Initial Schedule 13D Filings in 2022 by Filer Type

	Prominent Activists	Other Institutions	Other Individuals	All Filings
Number of unique lead filers	22	720	252	994
Number of initial filings	60	843	258	1,161
Median calendar days from trigger date* to filing date	9	10	11	10
Median ownership reported in filing	6.6%	15.0%	10.5%	13.0%

* The trigger date is the date on which the investor has acquired beneficial ownership of more than 5% of a class of equity securities described in Section 13(d)(1) of the Exchange Act and Rule 13d-1(i), or, for an investor previously eligible to file a Schedule 13G in lieu of a Schedule 13D pursuant to Rules 13d-1(b) or (c), the date on which the investor becomes ineligible to report on Schedule 13G.

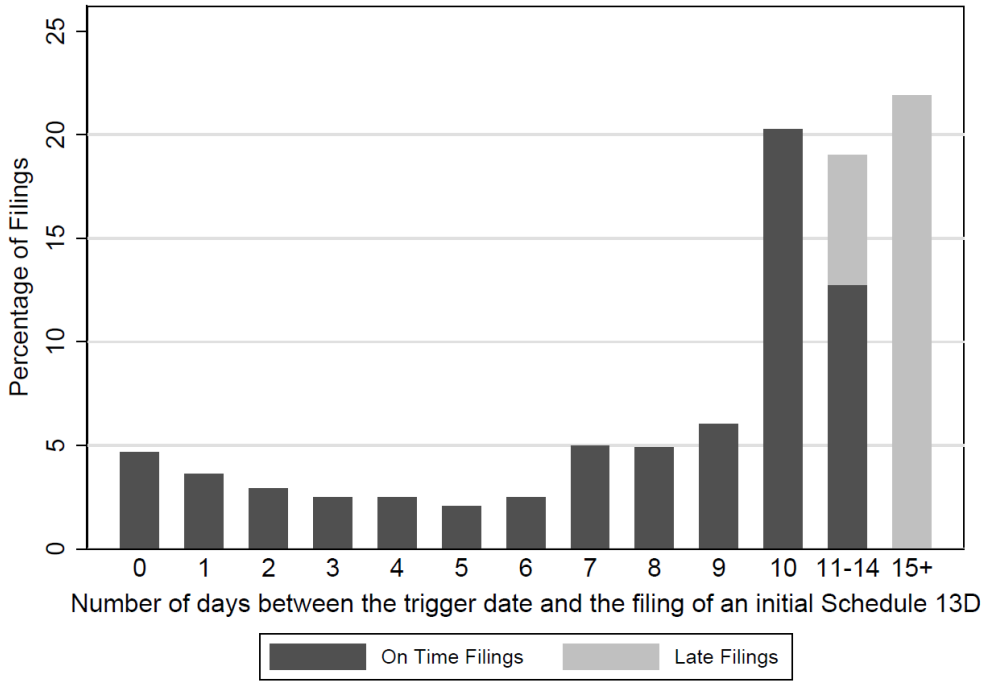
We present the breakdown of filer type in the initial Schedule 13D filings under the baseline in Table 1 to characterize the affected parties. We did not limit our analyses of costs and benefits to any of these categories.[693]

reported by a group of co-filers in approximately 7% of the filings. In contrast, alternative algorithms we considered to aggregate ownership reported in different fields in a given filing very often vastly overstated ownership due to the double-counting of shares whose beneficial ownership could be attributed to multiple affiliates.

693 *See* letter from EIM IV (stating that the categorization of filers by type in the DERA Memorandum implied that "activists (prominent or otherwise) warrant separate regulatory scrutiny"). This commenter also raised concerns about the reliability of the FactSet SharkRepellent database used to identify "prominent activists," including whether the data is "accurate and current." We note that the FactSet SharkRepellent database including the "Sharkwatch 50" is used, currently, by both academics (*see, e.g.*, Ian Appel & Vyacheslav Fos, *Short Campaigns by Hedge Funds* (Working Paper, Feb. 2023), available at https://ssrn.com/abstract=3242516) and practitioners (*see, e.g.*, the activist surveillance tool offered at *Activist Surveillance*, THE CONFERENCE BOARD, https://www.conference-board.org/proxyvoting) to identify prominent activists. We also note that the categorization "prominent activist" is used in the production of descriptive statistics that characterize Schedule 13D filings and the affected parties but does not contribute to key results or estimates of our analyses. Nevertheless, given this commenter's concerns, staff revised its approach to identifying "prominent activists" by supplementing the "Sharkwatch 50" with an annual ranking of top activists published by Insightia (including a total of 34 "top ten" activists over 10 years) to compile a broader list of "prominent activists." *See supra* note 692. This revision resulted in the addition of five Schedule 13D filers from our 2011-2021 sample to the category of "prominent activists."

A detailed day-by-day breakdown of the percentage of the filings made each day after the trigger date is provided in Figure 1 below.[694]

Figure 1. Days between trigger date and the filing of initial Schedule 13D filings in 2022



About 71 percent of all of the initial Schedule 13D filings in 2022 were filed within the existing 10-day filing window (represented by the dark grey bars),[695] with about 34 percent of the filings being made on the filing deadline.[696] Approximately 29 percent of the initial Schedule

694 This figure is based on staff analysis of EDGAR filings and reflects the subset of filings (1,136 of the total 1,161 filings reported in Table 1) for which required information could be extracted.

695 We note that approximately 42% of the Schedule 13D filings in Figure 1 were made after the tenth day following the trigger date. However, not all of these filings are considered late by the Commission. By rule, the Commission accepts as timely any filing that, if the calendar due date falls on a weekend or holiday, is received by the next business day. 17 CFR 240.0-3(a) ("[I]f the last day on which [a filing] can be accepted as timely filed falls on a Saturday, Sunday or holiday, such [filing] may be [made] on the first business day following."). Therefore, after accounting for weekends and holidays, we preliminarily estimate that about 29% of the filings (represented by the light grey bars) were late.

696 This statistic includes the 20.7% of initial Schedule 13D filings made on the 10th day after the trigger date (*i.e.*, the dark gray bar for day 10 in Figure 1) as well as those filings made after the 10th day but still considered timely due to holidays or weekends (*i.e.*, the dark gray portion of the bar for days 11-14 in Figure 1). *See supra* note 695.

13D filings, representing about 41 percent of all of the initial Schedule 13D filings that were filed by the current filing deadline, were filed within the amended five-business day deadline.

ii. Types of Filings

An initial Schedule 13D filing obligation is triggered by the acquisition of beneficial ownership of more than five percent of a covered class, which can be achieved through various means, including via the purchase of shares on the open market as well as the receipt of shares through events involving off-market transactions. Initial Schedule 13D filings are required in a number of different circumstances, only some of which reflect shareholder activism, as noted by commenters.[697] As discussed further below, filings involving the acquisition of shares as a result of certain corporate actions and other off-market transactions (*e.g.*, compensatory equity grants to executives) are less likely to be characterized as announcements of activist campaigns.

Based on staff review of over a decade of Schedule 13D filings,[698] we believe that the nature of transaction history disclosures, which are required pursuant to Item 5(c) of Schedule 13D,[699] provide a reasonable means of distinguishing, in a large sample, those filings that are likely to reflect the acquisition of beneficial ownership through corporate actions or other off-

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697 *See, e.g.*, letter from STB (stating that "the Commission should recognize that the investors who file on Schedule 13D are by no means all activist investors engaging in the types of activities the Williams Act seeks to regulate").

698 Staff analyzed initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review. In particular, programmatic search terms were designed to identify text or data associated with transactions or with beneficial ownership obtained through various kinds of events (such as initial public offerings ("IPOs") and equity-based compensation awards). Programmatic text analysis was also used to extract transaction history data reported in tabular form. Manual review of the extracted text and data and of the filings was used to better understand the nature of different filings and to what extent the extracted text and data were systematically related to the different types of underlying filings.

699 *See* 17 CFR 240.13d-101, Item 5(c) (requiring reporting persons to "[d]escribe any transactions in the class of securities reported on that were effected during the past sixty days or since the most recent filing of Schedule 13D").

market transactions as opposed to those that are more likely to represent activist campaigns.[700] In particular, for those filings for which we could not extract a history of transactions in tabular form, we found that most reported only one or two transactions, representing off-market transfers of shares.[701] We found that these filings are typically associated with beneficial ownership acquired in events such as the consummation of negotiated mergers and acquisitions, IPOs, other restructurings, private placements, or compensation awards.[702] We therefore categorize these filings as "corporate action filings."[703] In contrast, we found that filings that report a transaction history pursuant to Item 5(c) in tabular form are typically associated with the accumulation of shares in open-market trading through a series of multiple transactions and are more likely to discuss potential plans and proposals that are commonly viewed as characteristic of activist

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700 We also note that the nature of transaction history disclosures affects staff's ability, in practice, to include filings in certain analyses. In particular, data on the share accumulation patterns of the filer could only be systematically extracted from filings when it was presented in tabular form, and such data is required for the analyses presented in Tables 5 and 6 below (in Sections C.1.a.iii and C.1.b.i).

701 This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review. In particular, staff used programmatic text analysis to extract potential transaction dates outside of any tabular disclosure by searching for any text in the format of a date that seemed to be accompanied by a price and/or a quantity of shares. Among the filings for which a tabular history of transactions was not extracted, no more than two potential transaction dates were extracted for about 70% of the filings. Upon manual review of the remaining 30% of the filings for which a tabular history of transactions was not extracted, staff found that a large number of the additional potential transaction dates that were programmatically extracted do not actually reflect transactions. We therefore believe that a significant fraction of these remaining filings also reflect no more than two transactions.

702 This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review, including significant manual review of the disclosures pursuant to Item 3 of the Schedule 13D filings to confirm the source of the shares acquired. See *supra* note 698 for more detail on the analysis and review undertaken.

703 While we label all of these filings as "corporate action filings" for simplicity, we acknowledge that some of these filings represent transfers that are not strictly related to corporate actions, such as bequests of shares, and that our classification methodology is subject to some possible error. For example, 3% of these filings reflected in Table 2 below are made by Prominent Activists, as described *supra* note 692, (representing 28% of all of the filings by Prominent Activists in Table 1 above) and it is possible that such filings may represent activist campaigns incorrectly classified as corporate action filings.

campaigns.[704] We therefore categorize the filings for which we are able to extract a transaction history in tabular form as "non-corporate-action filings," which we view as more likely to involve activist campaigns, acknowledging that we may be somewhat over-inclusive in our application of the term "activist campaign."[705] We present a breakdown of the percentages of initial Schedule 13D filings in calendar years 2011 through 2021 that we characterize as "non-corporate-action filings" or "corporate action filings" based on the nature of transaction histories extracted from the filings in Table 2.[706]

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704 This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis and manual review, including significant manual review of the disclosures pursuant to Item 4 of the Schedule 13D filings regarding the purpose of the transaction. See *supra* note 731 for more detail on the analysis and review undertaken. Examples of plans and proposals that were considered characteristic of activist campaigns include potential discussions or recommendations with respect to board composition, other governance matters, business strategy, capital structure and dividend policies, and a potential sale process for the issuer or a segment of the issuer.

705 In a manual review of these filings, our staff did observe many instances of beneficial ownership held for investment purposes, with no stated plans or proposals, which are nonetheless included in our category of non-corporate-action filings by virtue of their filing on Schedule 13D (rather than Schedule 13G) and their inclusion of a tabular transaction history. In general, our classification methodology is subject to some possible error. Further, a filer might not consider itself an "activist investor" or be viewed as such even if it is involved in what we label as a non-corporate-action filing and characterize as a potential activist campaign for purposes of this memorandum.

706 These estimates are based on staff analysis of EDGAR filings, including programmatic text analysis to extract tabular trading histories. *See supra* note 692 regarding the filer type classifications. The classification of filings as late (in the notes accompanying the table) accounts for the effect of weekends and holidays. *See supra* note 695.

Table 2

Types of Initial Schedule 13D Filings in 2011-2021

	Number of Filings	Percentage of All Filings	Breakdown by Filer Type		
			Prominent Activists	Other Institutions	Other Individuals
Non-Corporate-Action Filings*	3,067	20%	28%	65%	7%
Corporate Action Filings**	12,657	80%	3%	67%	30%

* Filings for which tabular trading histories were extracted are categorized as "Non-Corporate-Action Filings" due to the results of our staff's programmatic and manual review of such filings. *See* note 705 regarding some of the limitations of this approach. About 11% of these filings were filed late relative to the current deadline (*see* note 706).

** Filings for which tabular trading histories were not extracted are categorized as "Corporate Action Filings" due to the results of our staff's programmatic and manual review of such filings. *See* note 703 regarding some of the limitations of this approach. About 34% of filings in this category were filed late relative to the current deadline (*see* note 706).

The categorization of filings presented in Table 2 was also included by staff in the DERA Memorandum. One comment letter addressing the DERA Memorandum indicated that the analysis presented in that memorandum (which is similar to analysis included in this economic analysis) was not replicable because it is "not based on publicly available information," citing staff's references to programmatic text analysis and manual review.[707] To clarify, the analyses in the DERA Memorandum and this economic analysis are based on publicly available filings and datasets. The reliance of the staff's analysis on programmatic text analysis is limited primarily to the extraction of trigger dates, the reported level of beneficial ownership, and the tabular trading histories (as discussed in this section) from public initial Schedule 13D filings from EDGAR. This data or other data that would allow us to understand the share accumulation patterns of filers is not available from any third-party sources that we are aware of, and our extraction of this data is not novel; other researchers have extracted similar transaction history data from public

707 *See* letter from Profs. Bishop and Partnoy III.

Schedule 13D filings for the purpose of academic studies.[708] Further, the manual review (as well as certain additional programmatic text analysis) discussed in this section and elsewhere in this economic analysis is used to validate our methodologies and not to generate the results of the analyses.

Another commenter addressing the DERA Memorandum raised concerns about potential errors in the classification of filings as "non-corporate-action filings" category, as acknowledged by staff in the DERA Memorandum, and questioned why the magnitude of any overstatement of this category is not quantified.[709] In the discussion above, we acknowledge that some filings classified as non-corporate-action filings do not state plans and proposals typical of activist campaigns. That said, these filings are still due consideration. That is, to the extent the share accumulation patterns reported in these filings would be affected by a shortened deadline, and to the extent these filings are associated with abnormal stock returns, they may still be important to consider in evaluating the costs and benefits quantitatively analyzed in this economic analysis. We also acknowledge above that some non-corporate-action filings may be incorrectly categorized as corporate action filings.[710] While we acknowledge the potential noise in our data,

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708 *See, e.g.*, Pierre Collin-Dufresne & Vyacheslav Fos, *Do Prices Reveal the Presence of Informed Trading?*, 70 J. FIN. 1555 (2015) ("Collin-Dufresne & Fos 2015 Study"); Yu Ting Forester Wong, *Wolves at the Door: A Closer Look at Hedge Fund Activism*, 66 MGMT. SCI. 2347 (2020) ("Wong 2020 Study").

709 *See* letter from EIM IV. That commenter also stated that the categorization of filings presented in the DERA Memorandum would, in some cases, result in "potential double counting" whereby "Schedule 13D filings with respect to a single M&A transaction would likely end up in both categories." *Id*. We do not believe there is a risk of double-counting in this sample given that it is limited to initial Schedule 13D filings and each filing appears only in a single category. If a person that is a potential acquiror in an M&A transaction files an initial Schedule 13D while assembling an initial position, and then files a Schedule 13D amendment upon consummation of the acquisition of the issuer, only the initial Schedule 13D would appear (in a single category) in our analysis.

710 One commenter suggested that staff "could have alternately analyzed a set of Schedule 13D filed by prominent activists to avoid assignment errors." *See* Craig Lewis, *Review of the Supplemental Data and Analysis on Certain Economic Effects of Proposed Amendments Regarding the Reporting of Beneficial*

we believe that any large dataset or classification approach applied to a large dataset would be subject to some degree of error. Another commenter suggested that we consider using an alternative database, stating that it "includes a more comprehensive dataset on non-corporate action filings and activist campaigns than that created by DERA."[711] Our initial dataset includes all Schedule 13D filings on EDGAR, so we expect it to be fully comprehensive. As discussed above, the subset of these filings that are categorized as non-corporate-action filings may not include every filing that some may consider to represent an "activist campaign." However, it is not practical to extend the key analyses conducted later in this economic analysis to additional filings because staff was, by definition, unable to systematically extract transaction history data for the filings classified as corporate action filings, and data on the share accumulation patterns of the filer are required for these analyses.[712] We do not believe that potential misclassifications have a meaningful impact on the results or interpretation of the analyses in this economic analysis.[713]

Ownership, exhibit to letter from EIM IV ("Lewis Study II (exhibit to letter from EIM IV)"). We note that prominent activists are responsible for a minority of non-corporate-action filings (per Table 2) and that we do not believe it would be appropriate to limit our assessment of costs and benefits to this subgroup of filers given that filings by less prominent activist investors and filers that do not consider themselves to be "activist" investors are also due consideration and may be associated with similar types of costs and benefits. Further, it is not necessarily the case that filings by prominent activists are misclassified as corporate action filings, as many of these filers engage in a variety of activities which could include involvement in corporate actions of the types listed above.

711 *See* letter from CIRCA IV (recommending the use of the 13D Monitor database).

712 *See* Tables 5 and 6 below (in Sections C.1.a.iii and C.1.b.i).

713 For example, staff found that many filings by prominent activists that were categorized as "corporate action filings" did not involve the accumulation of shares on the open market during the filing window, which is why staff could not extract a tabular transaction history. This finding also means that the risk that the filer's acquisition of its beneficial ownership interest could be affected by the shortened filing deadline is limited.

iii. Timing of Share Accumulation

Because the final amendments will shorten the window between the trigger date and filing deadline for an initial Schedule 13D filing, we also consider current practices under the baseline with respect to the timing of the filer's accumulation of shares during the filing window.

As discussed above, for those initial Schedule 13D filings that we classify as "corporate action filings," which represent about 80 percent of initial Schedule 13D filings (per the second row of Table 2), we found that most reported only one or two transactions representing off-market transfers of shares.[714] These transfers typically took place on or very close to the trigger date.[715] We found that very few of these transfers occur following the fifth day after the filer[716] crosses the five percent threshold.[717]

For initial Schedule 13D filings that we classify as "non-corporate-action filings," we use data extracted from the filings to examine filers' current patterns of share accumulation. We extracted such data from the 3,067 non-corporate-action filings from 2011 through 2021 reflected in the first row of Table 2. We further refined the sample of filings to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple

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714 *See supra* note 701.

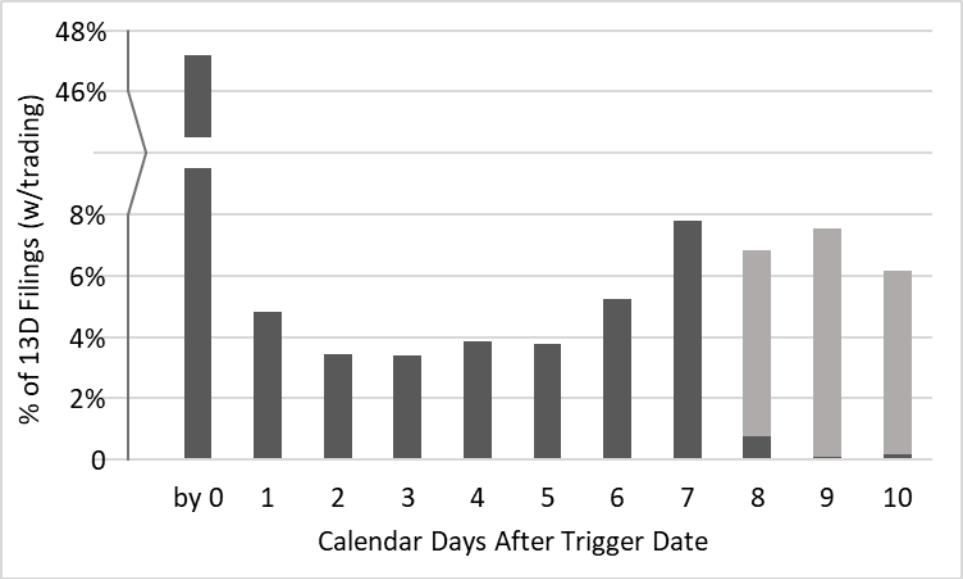
715 This observation is based on staff review of initial Schedule 13D filings from EDGAR from calendar years 2011 to 2021 through programmatic text analysis (to extract potential transaction dates, as discussed *supra* note 701, and to extract trigger dates) and manual review.

716 References to the term "filer" in this economic analysis are inclusive of the beneficial owner before the person actually made a Schedule 13D filing.

717 References to a filer "crossing the five percent threshold" in this economic analysis mean that the filer just completed acquiring beneficial ownership totaling more than five percent of a covered class or otherwise triggered a responsibility to file an initial Schedule 13D. Based on staff analysis of EDGAR filings through programmatic text analysis (to extract potential transaction dates, as discussed *supra* note 701, and to extract trigger dates), we estimate that about 2% of the potential transaction dates extracted from the text of corporate action filings between 2011 and 2021 occurred between the fifth day after the filer crosses the 5% threshold and the subsequent filing date. However, upon manual review, we found that many of these dates do not actually reflect transactions (*i.e.*, the dates were extracted because they seemed to relate to a number of shares and/or a price, but they reflect information other than specific transactions, as in the case of a summary of holdings as of the filing date that appears in the body of the filing).

filings on the same date.[718] Our refinements resulted in a sample size of 2,370 non-corporate-action filings, which we use for Figures 2, 3a, 3b, and Table 3 below. Figure 2 displays the percentage of non-corporate-action filings for which filers completed acquiring the total beneficial ownership reported in their initial Schedule 13D filing by the specified day after the trigger date.[719]

Figure 2. Percentage of non-corporate-action filings from 2011-2021 for which filers complete share accumulation as of a given day by calendar days after trigger date



The dark grey bars in Figure 2 represent filers that completed acquiring their total reported stake by the amended deadline, *i.e.*, five business days after their trigger date.[720]

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718 When multiple filings were made on the same date and pertain to the same issuer, only the filing reporting the largest stake is included in the analysis.

719 These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to extract trigger dates, the reported levels of beneficial ownership, and transaction histories, which were all used to determine share accumulation patterns; and to categorize filings, as discussed in the previous section). *See supra* Section IV.B.3.a.ii.

720 *See supra* note 695.

Summing the dark grey bars of the figure,[721] we find that about 80 percent of the filers completed acquiring their reported stake by the amended deadline. The remaining approximately 20 percent of filers (represented in the light grey bars) continued accumulating shares after the amended deadline.

We next explore the significance of additional accumulations of shares after the amended deadline. Figures 3a and 3b display, for the same sample of filings as in Figure 2, the percentage of filers that complete acquiring 90 percent and 75 percent, respectively, of their stake on the indicated day after the trigger date.[722]

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721 Typically, five business days translates to seven calendar days after weekends are accounted for. Occasionally, five business days includes more than seven calendar days because of federal holidays. For instance, if an investor crosses the 5% threshold on a Friday and the following Monday is a federal holiday, then five business days will equate to 10 calendar days.

722 These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to extract trigger dates, the reported levels of beneficial ownership, and transaction histories, which were all used to determine share accumulation patterns; and to categorize filings, as discussed in the previous section). See Section IV.B.3.a.ii. As discussed above, we use the maximum ownership separately reported in a filing as our measure of the total reported ownership, and, in some cases (approximately 7% of all of the Schedule 13D filings in Table 2 above), this approach may understate the aggregate ownership of a group of co-filers. *See supra* note 692. Because this measure of total reported ownership is used as the denominator to determine the percentage accumulation by a given day in these figures, our estimate of the percentage of reported ownership that is accumulated after the fifth business day following the trigger date may be overestimated in some cases. For example, we manually reviewed all filings categorized in the light grey bars of Figure 3b (those with 25% or more of their reported ownership accumulated after the amended deadline) and determined that 1 out of 16 filings in the light grey bars, or 6% of these filings, would not have been categorized in this group if our algorithm to extract total reported ownership from the filing was as precise as our manual review of the documents.

Figure 3a. Percentage of non-corporate-action filings from 2011-2021 for which filers achieve 90% of their total reported share accumulation as of a given day by calendar days after trigger date

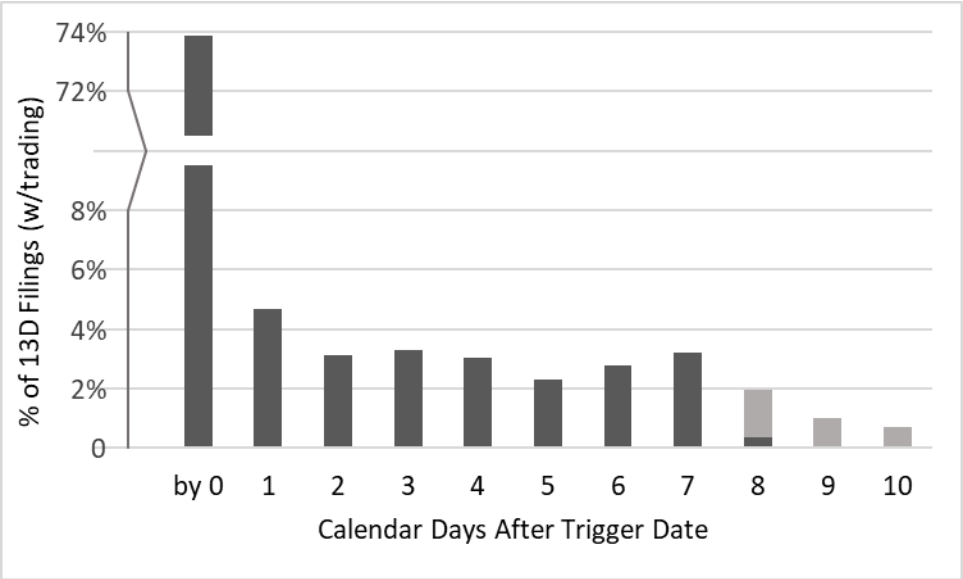
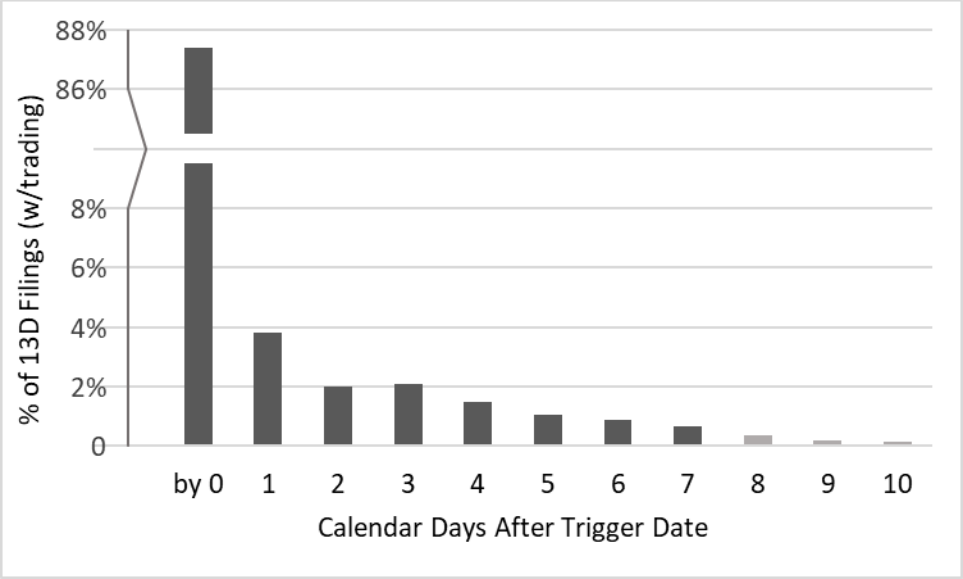


Figure 3b. Percentage of non-corporate-action filings from 2011-2021 for which filers achieve 75% of their total reported share accumulation as of a given day by calendar days after trigger date



The dark grey bars in Figures 3a and 3b represent filers that completed acquiring 90 percent or 75 percent, respectively, of their reported stake by the amended deadline. Summing the dark grey bars of Figure 3a, we find that about 97 percent of the filers completed acquiring

90 percent of their reported stake by the amended deadline, while the remaining three percent of filers (represented in the light grey bars) continued to accumulate shares constituting 10 percent or more of their reported stake after the amended deadline. Similarly, summing the dark grey bars of Figure 3b, we find that about 99 percent of the filers completed acquiring 75 percent of their reported stake by the amended deadline, while the remaining one percent of filers continued to accumulate shares representing 25 percent or more of their reported stake after that date.

The number and percentage of non-corporate action filings with different degrees of accumulation from Figures 2, 3a, and 3b are summarized in Table 3.[723]

Table 3
Degree of Accumulation by Amended Deadline
Non-Corporate-Action Filings of Initial Schedule 13D (2011-2021)

	Percent of Stake Accumulated by Amended Deadline			
	(1) 100% (full stake)	**(2) <100%**	**(3) <90% subset of (2)**	**(4) <75% subset of (3)**
Number of campaigns in sample	1,907	463	78	16
Percent of campaigns in sample	80%	20%	3%	1%
Average number of campaigns/year	173	42	7	1

Column 1 of Table 3 (representing the same filings as those in the dark grey bars of Figure 2) presents information about campaigns in which the filer completed accumulating their shares by the amended deadline (five business days after crossing the five percent threshold). Column 2 (representing the same filings as those in the light grey bars of Figure 2) presents information about the remainder of the campaigns, in which the filer continued accumulating

[723] These estimates are based on staff analysis of EDGAR filings through programmatic text analysis. *See supra* notes 719 and 722.

shares after the amended deadline. Columns 3 and 4 (representing the same filings as those in the light grey bars of Figure 3a and 3b respectively) present the subsets of the campaigns in Column 2 in which the filer had accumulated less than 90 or 75 percent, respectively, of their stake by the amended deadline (*i.e.*, 10 percent or 25 percent, respectively, or more of their stake was accumulated between the amended deadline and their actual filing date).[724]

b. Schedule 13G Filings

During calendar year 2022, the Commission received a total of 26,523 Schedule 13G filings, including 8,433 initial filings and 18,090 amendments.[725] Overall, the initial filings and amendments involved 4,321 unique lead filers.[726] Additional details specific to the initial filings, including their breakdown and characteristics by filer type, are presented in Table 4.[727]

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724 The figures in Tables 3, 5, and 6 use the same methodology as in Table 2 and as discussed in Section IV.B.3.a.ii for identifying non-corporate action filings. A different methodology, such as those proposed in some comment letters *(see supra* notes 710-711), would likely yield different campaign counts and percentages in Table 3.

725 These estimates are based on staff analysis of EDGAR filings. The Proposing Release reported that the Commission received 44,059 Schedule 13G filings (12,838 initial filings and 31,221 amendments) in calendar year 2020. As noted in the DERA Memorandum, based on further staff review of these reported statistics, we believe they included duplicate records, and that the actual number of unique Schedule 13G filings received in 2020 was 22,080 filings (6,436 initial filings and 15,644 amendments), which are similar to the counts provided for 2022 above.

726 This estimate is based on staff analysis of EDGAR filings. "Lead filer" indicates the filer that submits a filing to the Commission, though the same filing may include information about additional co-filers.

727 These estimates are based on staff analysis of EDGAR filings. Information about the number of days from the trigger date to the filing date of the Schedule 13G and the beneficial ownership percentage reported in the Schedule 13G, respectively, are based on a subset of filings (about 95% of the filings) for which staff was able to extract the required information. We note that staff's methodology for identifying the filer type associated with a given filing has been refined since the publication of similar statistics for 2021 in the DERA Memorandum. The Proposing Release reported that, at that time, it was impracticable to produce statistics on the median days to file for different types of filers. Our staff has since structured the underlying data into a more readily analyzable format and we have included these statistics in the table. See *supra* note 692 for details on the extraction of percentage beneficial ownership data from filings.

Table 4

Initial Schedule 13G Filings in 2022 by Filer Type

	QII	Exempt Investor	Passive Investor	Total
Number of unique lead filers*	567	1,340	793	2,633
Number of initial filings*	4,660	1,508	2,222	8,433
Median calendar days from trigger date** to filing date	40	45	10	39
Median ownership reported in filing	6%	15%	6%	7%
% filers also filing Form 13F	84%	10%	31%	30%

* The total numbers of unique lead filers and of initial filings reported in the table each differ from the sum across columns because the same filer may fall into multiple categories and filer type could not be determined for about 0.5% of the filings.

** For Passive Investors, the trigger date is the date on which the investor has acquired beneficial ownership of more than 5% of a covered class. QIIs and Exempt Investors each have different initial Schedule 13G filing trigger dates and filing deadlines. See Section II.A.2 above for more detail.

Table 4 demonstrates that initial Schedule 13G filings are somewhat concentrated among QIIs, who represent about one fifth of the filers but are responsible for over half of the filings.[728] Per the second row of the table, QIIs are also more likely to report their ownership of securities on a quarterly basis on Form 13F, with 84 percent of QIIs filing a Form 13F (compared to 30 percent for all initial Schedule 13G filers).[729]

C. Economic Effects of the Final Rules

In this section, we discuss the anticipated benefits and costs of the final rules, some of which cannot be quantified for reasons discussed below. We considered all of these costs and

728 Per the first row of the table, QIIs represent 567 out of 2,633 unique lead filers, or about 22% (567/2,633) of the unique lead filers. Per the third row of the table, QIIs are responsible for 4,660 out of 8,433 initial filings, or about 55% (4,660/8,433) of the initial filings.

729 Institutional investment managers that use the United States mail (or other means or instrumentality of interstate commerce) in the course of their business and that exercise investment discretion over $100 million or more in Section 13(f) securities must file Form 13F.

benefits in their entirety. We have integrated our discussion of potential effects on efficiency, competition, and capital formation within our discussion of the other benefits and costs of the final amendments. Our analysis of the economic effects includes certain quantifiable elements based on historical data.[730] These elements may provide insights into certain benefits and costs—including with quantitative data and also with non-quantifiable benefits and costs—but those insights are conditional on, and constrained by, the reactions of market participants to the final amendments. Finally, we have indicated where quantitative data discussed in our analysis do not represent the Commission's cost or benefit estimates of the final amendments.

1. Shortened Initial Schedule 13D Filing Deadline

The final amendment to Rule 13d-1(a) shortens the initial Schedule 13D filing deadline from 10 calendar days to five business days after the date of the acquisition that results in a person's beneficial ownership of a covered class exceeding five percent of that class. The final amendments to Rules 13d-1(e), (f), and (g) similarly shorten the initial Schedule 13D filing deadline for investors who are no longer eligible to file Schedule 13G in lieu of Schedule 13D.

a. Benefits

The disclosures required under Schedule 13D consist, among other matters, of information related to significant shareholders and potential changes of corporate control. An earlier filing deadline for Schedule 13D will allow information to be incorporated into securities prices sooner and allow market participants to make better-informed investment decisions. Shortened filing deadlines may lessen the opportunity for what we have termed "informed bystanders" to gain advantages over the average selling shareholder, as further discussed below, which could ultimately enhance trust in markets and thereby capital formation. Finally, we

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730 *See infra* Section IV.C.1.a.iii, Table 5 and Section IV.C.1.b.i, Table 6.

expect that shortening the deadline will reduce overall informational asymmetries in the market, thereby improving liquidity, which benefits all market participants, including activists. While we think the benefits to market participants arising from the final amendments will be significant, these benefits are not quantifiable.

i. Extent of Earlier Disclosure of Information

This subsection provides some data about the extent of information that may be revealed to the market more quickly under the final amendments, as support for the discussion of benefits in the subsections that follow. [731] As discussed in Section IV.B.3 above, among initial Schedule 13D filings that were timely filed in 2022 in accordance with the existing filing deadline, roughly 41 percent were already filed within the amended filing deadline.[732] The final amendments may thus result in earlier filing for about 59 percent of timely Schedule 13D reports.

For those initial Schedule 13D filings that would be filed earlier under the amended filing deadline, the amount of market-moving information that could be revealed more quickly under the final rules varies across filings. To better understand the extent of information that could be more quickly incorporated into market prices under a shortened filing deadline, we explore how the stock market reacts on and around Schedule 13D filing dates for different types of filings. Figure 4 presents the average pattern in abnormal returns[733] for filings from 2011 through 2021

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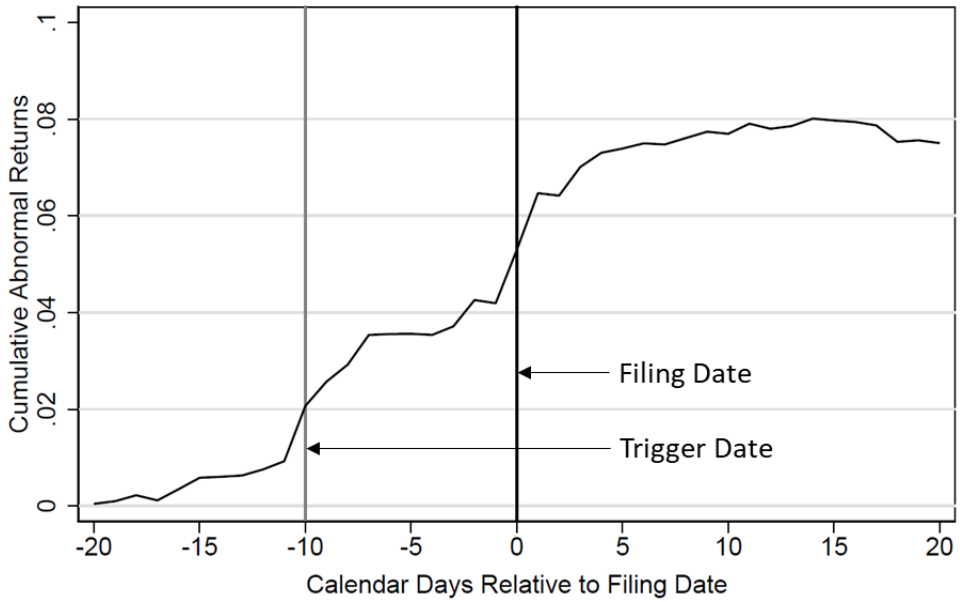
731 *See infra* Sections IV.C.1.a.ii through iv.

732 About 71% of initial Schedule 13D filings are timely filed in accordance with the existing filing deadline. *See* Section IV.B.3.a above. Our analyses of costs and benefits generally exclude the remaining roughly 29% of filings, which are filed late based on the existing filing deadline, because it is difficult to predict how filers that are not in compliance with the current filing deadline will react to a change in this deadline.

733 Throughout this subsection (and Sections IV.C.1.a.iii and IV.C.1.b.i below, as well as statements in other sections referencing the results of the data analyses presented in these sections), an issuer's "abnormal return" represents the difference between the issuer's market stock return and the Center for Research in Security Prices ("CRSP") value-weighted market index. We acknowledge that abnormal returns for a given issuer may be sensitive to the choice of benchmark and affected either positively or negatively by other

that we classify as "non-corporate-action filings," using the methodology described in Section IV.B.3.ii.[734] In order to align the trigger and filing dates across the filings reflected in the graph, we limit the filings included in the figure to those that used the full 10-day filing window to file.[735]

Figure 4. Cumulative abnormal return around filing date for "non-corporate-action filings" (from Table 2) from 2011-2021 that were filed 10 calendar days after trigger date



market or issuer events during the horizon of the analysis, though the impact of such confounding effects may be reduced when looking at the average abnormal returns across many issuers. References in other subsections to "abnormal returns" in the context of academic studies reflect the definitions of this term in each individual study (which may use different models to compute benchmark or "normal" returns for the purpose of isolating the "abnormal" portion of the returns).

734 These estimates are based on staff analysis of EDGAR filings through programmatic text analysis as well as data from the CRSP database.

735 Figure 4 reflects a total of 534 filings, in all of which filers used the full 10-day filing window to file. To arrive at this figure from the total 3,067 non-corporate-action filings in Table 2, we retained only one filing when multiple filings were made for the same issuer on the same day and limited the sample to filings for which stock return data is available. These restrictions led to a sample of 2,553 non-corporate-action filings. The additional requirement that the filer used the full 10-day filing window to file results in the figure reflecting about 21% of this sample of 2,553 filings. If we instead consider the subset of the 2,553 non-corporate-action filings that were filed after the amended filing deadline but not after the current filing deadline (*i.e.*, the subsample that would be more likely to be affected by a change in the filing deadline), the figure reflects about 37% of this subsample of filings. Data on the abnormal returns between five business days after the trigger date to the actual filing date for additional subsets of non-corporate-action filings is presented in Table 5 below.

Figure 4 demonstrates that the stocks of issuers that are the subject of these filings experience an abnormal return of roughly three percent from day seven—the approximate number of calendar days corresponding to five business days—following the trigger date to the day after the filing date.[736] This pattern of returns suggests that, for this group of filings, there is market-moving information that is currently not fully incorporated into market prices as of the amended filing deadline, and which would be likely to be revealed earlier if similar filings were made under the amended filing deadline.[737] We estimate that about 43 percent of timely non-corporate-action filings are currently filed by the amended filing deadline, such that the remaining 57 percent of timely non-corporate-action filings would be subject to earlier disclosure under the final amendments and are expected to generate the benefits discussed in the following subsections.[738]

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736 The amended deadline corresponds to approximately 7.25 calendar days: (365.25 calendar days per year ÷ 252 business days per year) × (5 business days).

737 One commenter stated that the DERA Memorandum included "no discussion of what may cause [the gains after the filing date in the figure], or, importantly, whether, if the filing period is shortened, the gains that the Commission labels as 'abnormal' in the five-day window prior to filing will simply shift to the period after the amended filing deadline." *See* letter from EIM IV. We note that the pattern of some additional positive price movement, or price drift, after the filing date is consistent with what has been found in academic studies and that researchers generally use an event window including a period after the filing date (such as from 20 days prior to 20 days after a Schedule 13D filing date) to capture what is believed to be the full abnormal return associated with a Schedule 13D filing. *See, e.g.*, Brav et al. 2022 Study. Such post-disclosure abnormal return patterns have been found to be associated with a wide variety of types of corporate news. *See, e.g.*, David Hirshleifer et al., *Driven to Distraction: Extraneous Events and Underreaction to Earnings News*, 64 J. FIN. 2289 (2009) (stating that "[i]n several kinds of tests, there is on average a delayed price reaction to news that has the same sign as the immediate response"). However, we continue to believe that it is reasonable to expect that, all else equal, an accelerated filing date would be likely to accelerate the returns between the amended filing date and the day after the current actual filing date (which, per Figure 4, is concentrated around the actual filing date itself) rather than the returns shifting to the period after the amended filing deadline because this abnormal return likely reflects the immediate market reaction to the filing.

738 These estimates are based on staff analysis of EDGAR filings. The estimates are based on the same sample of non-corporate-action filings from 2011 through 2021 used in Figures 2, 3a, and 3b above (*i.e.*, the sample refined to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple filings on the same date). *See supra* note 718 and accompanying text.

We next consider the filings that we classify as "corporate action filings." The average pattern in abnormal returns for these filings from 2011 through 2021 is presented in Figure 5.[739] In order to align the trigger and filing dates across filings reflected in the graph, we again limit the filings included in the figure to those that used the full 10-day filing window to file.[740]

Figure 5. Cumulative abnormal return around filing date for "corporate action filings" (from Table 2) from 2011-2021 that were filed 10 calendar days after trigger date

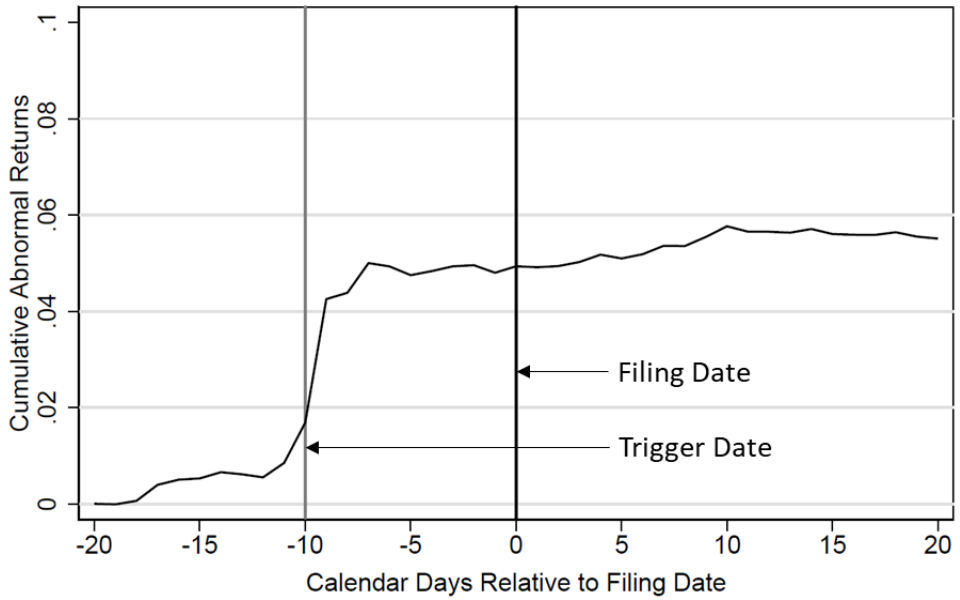

Figure 5 demonstrates that, in contrast to the pattern observed for non-corporate-action filings, the vast majority of the market stock price reaction to corporate action filings occurred

739 These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in Section IV.B.3.a.ii above, and to extract the required dates) as well as data from the CRSP database.

740 Figure 5 reflects a total of 1,492 filings, in all of which filers used the full 10-day filing window to file. To arrive at this figure from the total 12,657 corporate action filings in Table 2, as in the case of Figure 2, we retained only one filing in cases where multiple initial Schedule 13D filings were made on the same day for the same issuer. The figure is also limited to filings for which stock return data is available (generally, issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). These restrictions led to a sample of 6,125 corporate action filings. The additional requirement that the filer used the full 10-day filing window to file resulted in the figure reflecting about 24% of this sample of 6,125 filings. If we instead consider the subset of the 6,125 corporate action filings that were filed after the amended filing deadline but not after the current filing deadline (*i.e.*, the subsample that would be more likely to be affected by a change in the filing deadline), the figure reflects about 41% of this subsample of filings.

close to the day on which the filers crossed the five percent ownership threshold, triggering the requirement for a Schedule 13D filing. The limited market reaction between the amended deadline—five business days after the trigger date (or approximately seven calendar days)—and the day after the actual filing date implies that little market-moving information is revealed during this period. We did not conduct a systematic analysis to investigate potential explanations for this pattern of abnormal returns. However, it is possible that this pattern may reflect the existence of other disclosures about the associated events (outside of the Schedule 13D filing) that are made public on or close to the trigger date.[741] To the extent that the most value-critical information contained in the filing is already known to the market prior to the amended filing date (through legal means, such as other disclosures made outside the Schedule 13D), we do not expect the amended filing deadline to result in the earlier revelation of significant new information for corporate action filings.

ii. Improved Information Content of Stock Prices

The amended Schedule 13D initial filing deadline will get material information to investors faster. This will allow new information contained in Schedule 13D filings to be incorporated into market prices earlier,[742] allowing investors and issuers to make better-informed decisions.

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741 Staff reviewed a small number of individual filings and confirmed the existence of such disclosures, such as a Form 8-K disclosure on or within a day of the trigger date of a merger agreement or a bankruptcy, in the cases that were reviewed. However, we did not conduct more comprehensive or systematic analysis of such disclosures or other potential explanations for why the vast majority of the market stock price reaction for this group of filings occurred close to the trigger date and before the Schedule 13D was filed.

742 One commenter stated that our use of the term "market efficiency" to describe the earlier incorporation of information in market prices were in fact references to "strong-form market efficiency wherein share prices fully reflect all *public* and *private* information" which is viewed "as an idealized and unobtainable standard" in contrast to semi-strong market efficiency (wherein prices reflect all public information). The commenter noted that "defining mispricing in terms of private information that is not currently reflected in

Commenters agreed that the acceleration of filing deadlines would allow market prices to incorporate the information contained in a filing earlier,[743] investors to make better-informed decisions,[744] and issuers to make better-informed decisions in responding to the presence of a new significant shareholder.[745] On the other hand, some commenters questioned whether a shortened filing deadline would enhance market efficiency or requested further evidence or analysis of the effects on market efficiency.[746]

As suggested by a commenter,[747] we have considered patterns in abnormal returns around Schedule 13D filings to better assess the potential effect of the accelerated filing deadline on market prices (and, thereby, on decision-making by market participants). We note that decision-making and the efficiency of resource allocation are unlikely to materially improve with a shortened deadline for corporate action filings because, as discussed in the previous section, the vast majority of any market price reaction around the time of these filings seems, on average, to occur well before the amended deadline.[748]

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share price is a misleading characterization of price formation that serves as an impractical basis for regulation." *See* Lewis Study I (exhibit to letter from EIM I). Some commenters similarly questioned whether a delay in market prices reflecting a significant shareholder's investment constituted a mispricing that warranted correction. *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; Prof. Gordon; Profs. Schwartz and Shavell I. To avoid confusion, we no longer use the term "market efficiency" in this context, focusing instead on the earlier updating of market prices and resulting effects on decision-making (and thereby efficiency of resource allocation). We also no longer refer to prices that do not yet reflect the information in a Schedule 13D filing before it is filed as "mispricing."

743 *See* letters from AFREF; Nasdaq; TIAA.

744 *See* letters from AFREF; HMA I; Hoak; Nasdaq; TIAA.

745 *See* letters from NIRI; SCG.

746 *See* letters from AIMA; Dodge & Cox; EIM I; Rice Management.

747 *See* Lewis Study I (exhibit to letter from EIM I) (stating that "the Commission could have analyzed equity trading activity and abnormal returns around triggering and announcement dates to properly assess potential gains to market efficiency").

748 *See supra* Section IV.C.1.a.i.

By contrast, we documented that for non-corporate-action filings there are, on average, meaningful abnormal returns between the amended filing deadline and the day after the filing date. [749] These abnormal returns patterns suggest that market-moving information is revealed during this period. A shortened deadline will accelerate the remaining market price reaction with respect to non-corporate-action filings, as investors incorporate the new information into their buying and selling decisions. Investors and issuers, with earlier access to the information and an updated stock price, may then be able to make better-informed investment and resource allocation decisions. At the level of the economy as a whole, better investment and resource allocation decisions by individual issuers and investors under the amended filing deadline may improve the efficiency of resource allocation overall.

As discussed in the previous section, about 57 percent of timely non-corporate-action initial Schedule 13D filings, or about 122 filings of this type per year, are currently filed after the amended deadline.[750] Based on this historical filing behavior, we expect the amended deadline may give rise to an earlier market reaction than would otherwise have been experienced for approximately this number of filings per year. Thus, investors, issuers, and other market participants may have access to updated stock prices and the information disclosed in a Schedule 13D up to three days earlier for over 120 such events per year according to current estimates, allowing them to make better-informed decisions in each of those periods.

Some commenters stated that the market cannot impound new information into a price if that information has not been developed, or more generally indicated that the benefits of a shortened deadline were predicated on investors not forgoing investments that may give rise to a

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749 *See id.*

750 *See supra* Section IV.C.1.a.i.

Schedule 13D filing in response to the amended deadline.[751] We continue to believe that, holding the content of the filings constant, amending the deadline will allow for more informed decision-making and improve the information content of stock prices, with associated benefits for investors, issuers, and other market participants. We acknowledge that the improvement in the efficiency of resource allocation at the economy level could be mitigated to the extent that some of the research and/or investment activities giving rise to these filings are reduced or otherwise change after the adoption of the final amendments (see Section IV.C.1.b).

iii. Transfers from Selling Shareholders and Trust in Markets

In the days between the trigger date for an initial Schedule 13D and the filing date of that Schedule 13D under the current 10-day deadline, various investors may buy and sell shares of the subject issuer. The resulting trading losses and gains (whether or not the trading is based on information from or about the Schedule 13D filer) generally represent wealth transfers[752] among individual investors, not net costs to investors (and market makers) as a group. However, the possession of an informational advantage regarding the future control or potential strategic or operational changes at an issuer, together with the knowledge of the precise date of informational revelation, creates a near-arbitrage opportunity. The incentives to gain access to such information, and thus profit from it, can be strong. An extended window of time between the trigger date and the date on which the filer's beneficial ownership and plans are made public on

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751 *See* letters from CIRCA I; EIM I; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II.

752 We use the term "transfer" to distinguish the trading losses and gains from costs and benefits that may result from rule. *See* Current Guidance on Economic Analysis in SEC Rulemakings (Mar. 16, 2012) (*available at* https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf) at n.32.

Schedule 13D may increase the likelihood of information leakage to "informed bystanders"[753] who may then buy shares during the window of time just before the filing of the Schedule 13D. Such informed bystanders can thus profit from access to this information rather than from their own fundamental research or effort to improve the issuer's performance. We acknowledge, however, that some of these informed bystanders may be associated with shareholder value creation to the extent they may represent the entry of additional "activism-friendly" shareholders, which academic researchers have associated with greater returns to activism.[754]

Investors may possess information regarding activism for a variety of reasons. Some may emerge from fundamental research. For example, some investors may use research to identify companies that are likely to be targeted by activists. These investors may be able to glean information about the likelihood of an activist campaign from, for example, unexpected increases in trade volume. However, information leakage that creates a near-arbitrage opportunity for some investors (who themselves have not performed fundamental research to generate the information) is likely to erode trust in markets, reducing participation and capital formation.[755] We would expect that amending the filing deadline would increase perceptions of fairness in the markets, which could, in turn, lead to benefits in participation and liquidity. These benefits cannot be quantified but are nonetheless important.

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753 In a similar analysis in the DERA Memorandum, staff used the term "opportunistic traders" to reference these parties. We have revised the term used in response to a comment that this term seemed pejorative as well as comment letters that appeared to presume that the term was inclusive of the filer. *See, e.g.*, letters from CIRCA IV; EIM IV.

754 *See, e.g.*, Simi Kedia et al., *Institutional Investors and Hedge Fund Activism*, 10 REV. CORP. FIN. STUD. 1 (2021) ("Kedia et al. 2021 Study") (finding that a one-standard-deviation increase in the pre-existing "activism-friendly" ownership is associated with an increase in the 36-month buy-and-hold returns of 7.8% to 15.5%); Wong 2020 Study (finding that a proxy for a dispersed group of investors aligned with the activist buying shares before the Schedule 13D filing, measured based on abnormal trading volume on the date the activist exceeds 5% ownership, is associated with an increase in the buy-and-hold return over the course of an activist campaign of 5.5% to 8.4%).

755 *See*, *e.g.*, Luigi Guiso et al., *Trusting the Stock Market*, 63 J. FIN. 2557 (2008).

Academic research provides evidence consistent with informed bystanders buying shares just prior to Schedule 13D filings. For example, studies have identified unusual EDGAR search activity during the 10 days prior to a Schedule 13D filing[756] and abnormally high trading volume on the same day the filer crosses the five percent threshold[757] as evidence of certain traders other than the filer being aware of the filer's intentions. While the researchers note that some of the trading behavior investigated in these studies may simply reflect the reaction of sophisticated investors to unusual, public market data (such as that associated with the filer's purchases) in advance of a Schedule 13D filing, further evidence led them to suggest that at least some of the increased trading is by informed parties.[758]

Other research identifies specific types of informed bystanders or more direct evidence of those traders' source of information. For example, one study presented evidence suggesting that the broker of a filer may leak information about the filer's trades to other traders before the Schedule 13D filing.[759] Another study observed a correlation between purchases by insiders and by the filer before the Schedule 13D filing, and suggested this trading reflected inside

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756 *See* Ryan Flugum et al., *Shining a Light in a Dark Corner: Does EDGAR Search Activity Reveal the Strategically Leaked Plans of Activist Investors?*, J. FIN. QUANT. ANALYS. (forthcoming 2023), *available at* https://ssrn.com/abstract=3612507 ("Flugum et al. 2023 Study").

757 *See, e.g.*, Wong 2020 Study.

758 For example, the researchers found that institutions unusually accessing EDGAR filings for issuers prior to Schedule 13D filings each appeared to engage in this activity primarily for Schedule 13D filings pertaining to a particular filer, rather than predicting Schedule 13D filings in general. *See* Flugum et al. 2023 Study. Also, both this study and the abnormal volume study discussed above found evidence of abnormal trading activity even in the case of Schedule 13D filings made by previous Schedule 13G filers, which are less likely to be accompanied by unusual market activity associated with trades by the filer. *See* Flugum et al. 2023 Study; Wong 2020 Study.

759 *See* Marco Di Maggio et al., *The Relevance of Broker Networks for Information Diffusion in the Stock Market*, 134 J. FIN. ECON. 419 (2019) (finding that the "best clients" of the broker used by a filer, *i.e.*, those generating a large share of the broker's business, buy more of the target stock than other institutional investors in the 10 days prior to a Schedule 13D filing).

information and insiders' surveillance of trading volume and ownership data for the issuer's stock.[760]

Several commenters indicated that the economic analysis in the Proposing Release lacked evidence or quantitative analysis with respect to potential effects on selling shareholders under the current Schedule 13D filing deadline.[761] Others questioned the magnitude of any effects with respect to selling shareholders.[762] To better understand the potential effects of a shortened deadline on the type of activity discussed in these studies, we designed a quantitative analysis intended to estimate the wealth transfers, under the current rules, from selling shareholders to potential informed bystanders between the amended filing deadline and the actual filing dates.

Our analysis focuses on those initial Schedule 13D filings that we classify as "non-corporate-action filings," which represent about 20 percent of initial Schedule 13D filings (per the first row of Table 2).[763] For filings that we classify as "corporate action filings," we found

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760 *See* Georgy Chabakauri et al., *Trading Ahead of Barbarians' Arrival at the Gate: Insider Trading on Non-Inside Information* (Colum. Bus. Sch. Rsch. Paper, Jan. 2022), *available at* https://ssrn.com/abstract=4018057 (finding a significant concurrence between purchases of stock by insiders of the issuer and purchases by an activist in the 60 days, and particularly in the last 10 days, preceding a Schedule 13D filing).

761 *See, e.g.*, Lewis Study I (exhibit to letter from EIM I) (stating that the Commission could have attempted to quantify the intended benefits of the rule change to selling shareholders by "[e]stimat[ing] losses to selling shareholders with one of the trading models used to estimate damages in shareholder 10b-5 actions," wherein "[h]igh end estimates of costs could assume that all shares sold (after adjusting for estimates of dealer activity) during this period came from sales made by investors that would have benefited from having the information on Schedule 13D earlier"); letter from Profs. Swanson, Young, and Yust (discussing investors that sell prior to a Schedule 13D filing and related statistics and stating that "the forgone returns seem too small in of themselves to justify a change"); Profs. Bishop and Partnoy I (stating that "an intuitive concern about investors who might be disadvantaged by selling during the window before such filings" is unsupported by evidence).

762 For example, some commenters stated that any cost borne by selling shareholders is minor relative to benefits to other shareholders of the Schedule 13D filer's actions. *See* letters from AIMA; CIRCA I; EIM I; ICM; Profs. Schwartz and Shavell II; S. Lorne. We consider the potential benefits to shareholders from a filer's actions in Section IV.C.1.b.i below.

763 We make the same exclusions from the full sample of non-corporate-action filings as in the case of Figures 2, 3a, 3b, and Table 3 above (excluding late filers and filers with no beneficial ownership reported as of the

that there was limited stock price movement, on average, between the amended deadline and the day after the actual filing date.[764] We therefore expect that it is unlikely that there would have been material wealth transfers from selling shareholders to informed bystanders just prior to the actual filing date of these filings.

For the sample of non-corporate-action filings, we first examine abnormal[765] trading volumes in the days prior to an initial Schedule 13D filing to identify trading activity that could be curtailed by a shortened filing window. We focus on trading before the filing date to exclude trading in reaction to the information in the filing and use information on the filer's trades from Schedule 13D to exclude their trading activity from this analysis.

For non-corporate-action filings from 2011 to 2021, Figure 6 compares the average trading volume excluding the filer's accumulations ("Total Non-Filer Trading Volume") to the filers' average pattern of accumulations ("Filer Trading Volume").[766] Both measures are scaled by the normal level of daily trading volume in the issuer's stock such that a value of one for "Total Non-Filer Trading Volume" would mean there is zero abnormal trading volume outside of the filer's trades while a value of two for "Total Non-Filer Trading Volume" would mean that

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filing date and retaining only one filing among multiple filings on the same date), resulting in a sample of non-corporate-action filings consisting of 2,370 filings from 2011 through 2021. See *supra* note 718 and accompanying text for more information on the sample restrictions in the analysis.

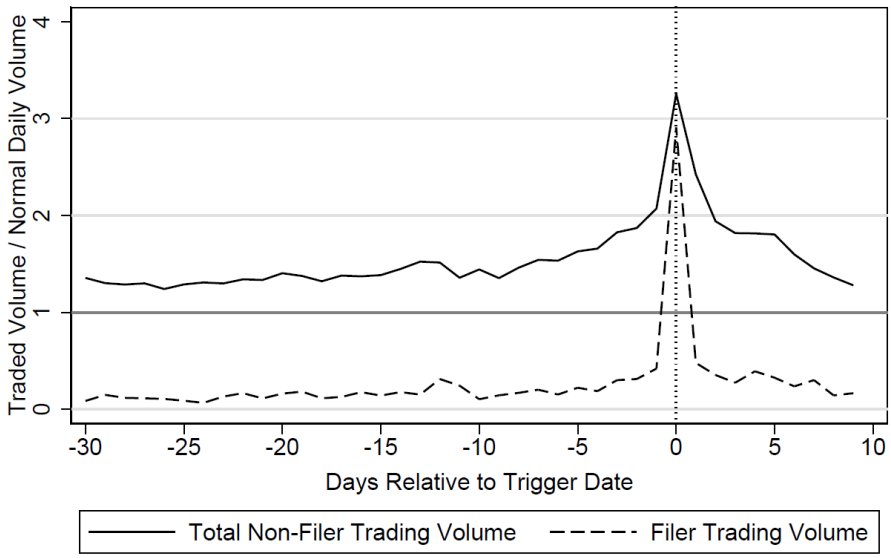
764 *See supra* Section IV.C.1.a.i.

765 We focus on abnormal trading volume rather than total trading volume because it is likely that the trades comprising the normal amount of trading volume represent investors making an exchange based on the same information set, even though ex post it may appear that the buyer turned out to be "lucky" and the seller "unlucky," as would be the case before the revelation of other positive news.

766 The estimates in the figure are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in Section IV.B.3.a.ii above, and to extract the required dates) as well as data from the CRSP database. The figure reflects the 1,686 non-corporate-action filings out of the total 2,370 filings in our analysis that had trading volume data available (generally reflecting issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). Abnormal trading volume is computed as the excess of trading volume over the average daily trading volume in the 60-day period beginning 120 days prior to the given date.

trading volume is double the usual level (*i.e.*, there is an amount of abnormal trading volume equal to the amount of normal trading volume). Because we exclude trading on or after the filing date, the graph ends before day 10.

Figure 6. Trading volumes around trigger date for non-corporate-action filings from 2011-2021, excluding trading volume on or after actual Schedule 13D filing date



Abnormal trading volume in an issuer's stock by traders other than the filer peaks on the same day the filer's trading peaks (*i.e.*, on the trigger date, when the filer crosses the five percent threshold). However, abnormal trading volumes continue to remain elevated for the rest of the 10-day filing window, including after the amended filing deadline, which occurs at approximately day seven after the trigger date, which may represent purchases by informed bystanders that were aware of the impending campaign. We note that there is also abnormal trading well in advance of the trigger date, and that this and other abnormal trading volume in the graph could reflect trading by informed bystanders, but could also reflect other traders simply reacting to the same news, market conditions, or trends in issuer performance that may have attracted the filer to engage in its transactions.

To understand the potential transfers from selling shareholders to informed bystanders that may be prevented or reduced by a shortened deadline, we focus on abnormal trading volume by traders other than the filer in the days between the fifth business day after the filer crosses the five percent threshold and the actual filing date. As in the case of Figure 6, we exclude trading on the actual filing date because there is typically significant trading volume in reaction to the filing on that date. While it is possible that there is additional trading by informed bystanders on the actual filing date but before the actual time that the filing becomes public, we are unable to distinguish any such trading from trading in reaction to the filing. For this reason, we exclude this trading, and our analysis will not include the transfers between informed bystanders and selling shareholders on the filing date.[767]

In order to estimate potential transfers from selling shareholders to informed bystanders, we also collected information on abnormal returns to understand the amount of appreciation obtained by potential informed bystanders by trading prior to the filing becoming public information. The pattern of abnormal returns[768] varies across scenarios in which the filer completed accumulating their reported stake by five business days after the trigger date but submitted their Schedule 13D filing later, and those in which the filer was still accumulating shares after five business days. Figures 7a and 7b present the average pattern of abnormal returns for these two scenarios separately. In order to align the trigger and filing dates across filings in

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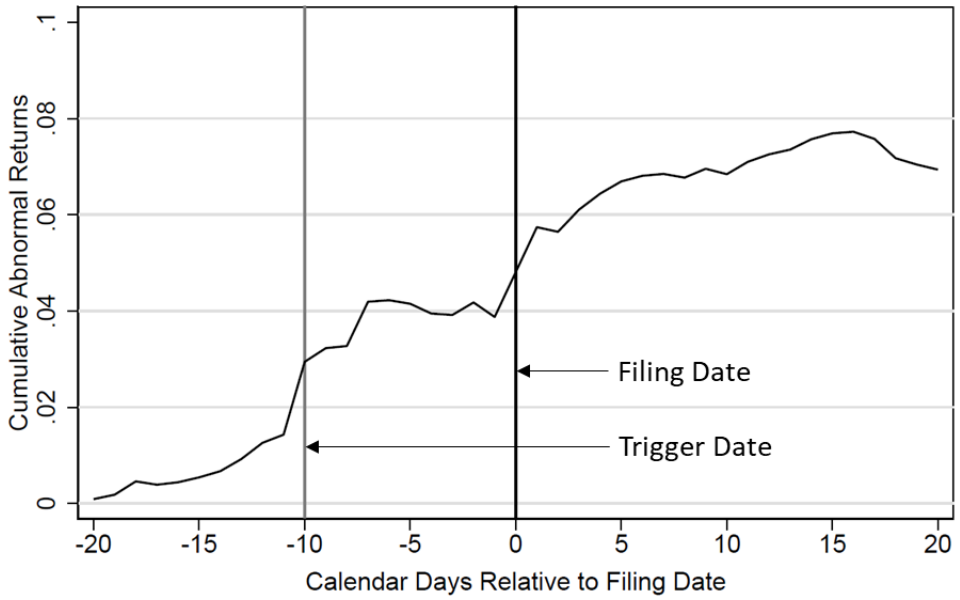
767 Given that the measured abnormal trading volume trends down over the filing window, as demonstrated in Figure 6, we expect that the effect of excluding this potential intra-day abnormal trading volume is relatively small.

768 As discussed above, throughout this section (as well as Section IV.C.1.a.i above and Section IV.C.1.b.i below), an "abnormal return" represents the difference between an issuer's market stock return and the CRSP value-weighted market index. *See supra* note 733.

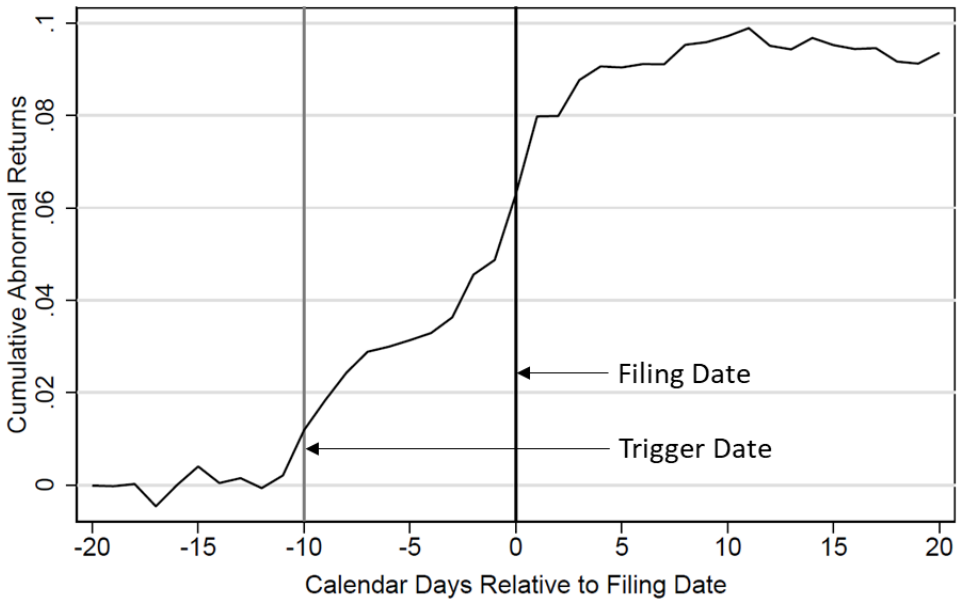
the graph, we limit the filings in the figure to those that used the full 10-day filing window to file.[769]

Figure 7a. Cumulative abnormal return around filing date for non-corporate-action filings from 2011-2021 filed 10 days after trigger date, and without filer purchases after amended filing deadline



[769] Besides the sample restrictions described *supra* note 763, Figures 7a and 7b are also limited to filings for which stock return data is available (generally, issuers listed on the NYSE, NYSE American, NASDAQ, and NYSE Arca exchanges). This restriction leads to a sample of 2,097 non-corporate-action filings. Filers of 1,669 of these filings completed acquiring their reported stake by the amended deadline, while the filers of the remaining 428 filings continued to accumulate part of their reported stake afterwards. The additional requirement in Figure 7a that the filer used the full 10-day filing window to file results in Figure 7a reflecting 294 non-corporate-action filings, or 18% of the subsample that completed acquiring their stake by the amended deadline. The similar requirement in Figure 7b results in this figure reflecting 205 non-corporate-action filings, or 48% of the subsample that continued to accumulate part of their reported stake after the amended deadline.

Figure 7b. Cumulative abnormal return around filing date for non-corporate-action filings from 2011-2021 filed 10 days after trigger date, and <u>with</u> filer purchases after amended filing deadline



The transfers from a selling shareholder to a potential informed bystander between the amended filing deadline and the current filing date would consist of the stock return between the day that they sell and the day after the filing date, when the information previously known to their trading counterparty is known to the whole market. Based on Figures 7a and 7b, there are meaningful abnormal returns between the amended filing deadline (which occurs around day −3 in the figure, as five business days generally corresponds to seven calendar days) and the day after the actual filing date for both subsamples of the filers in our analysis, with a greater abnormal return when the filer is still accumulating shares after five business days (*i.e.*, Figure 7b).

To estimate transfers from selling shareholders to informed bystanders that may be occurring between the amended filing deadline and actual filing dates, and thus might be avoided under the final rules, we used the data discussed above to conduct the analysis presented in Table

5.[770] As discussed in detail in Section IV.C.1.b below, the extent of filer share accumulation after the amended deadline may be associated with the likelihood that filers may modify or forgo these types of campaigns after the effective date of the final amendments. We therefore estimate the transfers separately for filings with the different patterns of filer share accumulation from Table 3.[771]

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[770] The estimates in the table are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in Section IV.B.3.a.ii above, to extract the data necessary to determine share accumulation patterns, as discussed *supra* note 719, and to extract the required dates) as well as data from the CRSP database. Estimates of abnormal returns and abnormal trading volumes (Rows 2 and 3) are based on the campaigns for which the required data was available. The estimate of transfers assumes trades on a given day are executed at the average of the closing price on that day and the closing price on the previous day and that the wealth transfer per share traded is the abnormal return experienced based on that starting price until one day after the filing date. For the aggregate estimate of the transfers from selling shareholders, the estimated average transfers from selling shareholders per campaign (in Row 5) is used as a proxy for the transfers from selling shareholders in campaigns for which the data required to produce this estimate was unavailable (about 19% to 49% of campaigns in any given category). Abnormal trading volume is computed as the excess of trading volume over the average daily trade volume in the 60-day period beginning 120 days prior to the given date. We note that one commenter stated that, based on the description of the estimate of transfers in the DERA Memorandum, a more accurate estimate would "account for abnormal price changes by adjusting for overall stock market variations." *See* Lewis Study II (exhibit to letter from EIM IV). The description in the DERA Memorandum was imprecise on this point. The estimates of transfers in the memorandum as well as the estimates presented here are based on abnormal returns that do in fact adjust for market variations. *See supra* notes 733 and 768. Another commenter stated that "CRSP volume is known to be inaccurate for NYSE-listed stocks because the CRSP data source rounds volume to the nearest hundred." *See* letter from Profs. Bishop and Partnoy III. We acknowledge this potential issue in CRSP volume data but note that the average and aggregate statistics that we present in the table should not be meaningfully affected by such rounding error.

[771] The columns of Table 5 reflect the same subsamples of filings as the corresponding columns of Table 3 with the additional restriction that filings are only included if there would have been an opportunity to trade on a day between the amended deadline and the actual filing date.

Table 5

Analysis of Potential Transfers from Selling Shareholders to Informed Bystanders by Degree of Filer Accumulation by Amended Filing Deadline, Annualized (2011-2021)

	Percent of Stake Accumulated by Filer by Amended Deadline			
	(1) 100% (full stake)	**(2) <100%**	**(3) <90% subset of (2)**	**(4) <75% subset of (3)**
(1) Average number of campaigns / year with potential transfers between amended deadline and filing date*	54	41	7	1
Filer/Campaign Characteristics:				
(2) Median abnormal return from amended deadline to day after filing	.5%	1.9%	3.1%	6.9%
Analysis of Transfers:				
(3) Average total abnormal trading volume other than filer's trades between amended deadline and filing date (% shares outstanding)	.8%	.7%	1.5%	2.6%
(4) Average transfers from selling shareholders, per campaign**	$425K	$640K	$1.8M	$5.1M
(5) Aggregate transfers from selling shareholders for this category	$23M/year	$26M/year	$13M/year	$7M/year

* These campaigns represent the subset of the filings in Table 3 for which there are trading days between the fifth day after the trigger date and the filing date.

** Transfers are computed as the sum across days of the abnormal trading volume (less the filer's trades) in shares on a given day between the amended and actual filing date times the abnormal return from that day to the day after the filing date. *See* note 770 for additional details.

Rows 2 and 3 of Table 5 present information on the abnormal returns and abnormal trading volume between five business days after the trigger date (the amended deadline) and the filing date in each subset of campaigns. Both the abnormal returns (which would drive the extent of wealth transferred by trading with an informed bystander in this timeframe) and the abnormal volume (which characterizes the potential number of such trades) are higher for campaigns in

which the filer is still accumulating a significant portion of their stake after five business days following the trigger date.

The estimates in Row 5 of Table 5 represent potential transfers from selling shareholders to informed bystanders after five business days following the trigger date for each subset of campaigns based on a day-by-day analysis of the abnormal volume and the potential forgone return for each underlying campaign.[772] For example, the aggregate estimate of potential transfers to informed bystanders that could be avoided by shortening the filing deadline to five business days if no filers forgo campaigns (and filers do not adapt in such a way that these transfers may still occur) is about $49 million per year ($23 million from Column 1 plus $26 million from Column 2). Alternatively, if we assume that filers accumulating 25 percent or more of their stake after five business days forgo such campaigns, the aggregate estimate of potential transfers to informed bystanders that could be avoided would be about $42 million per year ($49 million, as computed above, minus $7 million from Column 4).[773] We note that the wealth transfer estimates in Table 5 do not represent estimates of the benefit of the final rule amendments. Rather, the estimates provide insight into an informational disparity that could weaken trust in the market and consequently market participation and capital formation.

The estimates in Table 5 assume that abnormal trading volume on the days between the amended deadline and the actual filing date, other than that representing the filer's own trades, represents trades by informed bystanders. It is possible that the abnormal trading volume represents other traders' reactions to similar news, market conditions, and trends as those to

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772 We acknowledge that the estimates in Row 5 of Table 5 are approximate and may be sensitive to the methodology for estimating abnormal returns. *See supra* note 733.

773 Similarly, if we assume that filers accumulating 10 percent or more of their stake after five business days forgo such campaigns, the aggregate estimate of potential wealth transfers that could be avoided would be about $36 million per year ($49 million, as computed above, minus $13 million from Column 3).

which the filer was reacting.[774] For example, researchers have found that filers time their accumulations to coincide with significant selling by institutions, so it is possible that some of this abnormal volume may represent the extent of the institutional selling pressure.[775] We also acknowledge that informed bystanders, like filers,[776] may adapt to the final amendments by condensing their trades to five business days following the trigger date.

Staff presented a similar quantitative analysis with respect to potential transfers from selling shareholders to informed bystanders under the current rule in the DERA Memorandum. Some commenters stated that the analysis in the DERA Memorandum demonstrated that a shortened filing window would reduce "harms" or "costs" to selling shareholders.[777] Others

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774 One commenter addressing a similar analysis in the DERA Memorandum stated that "there is no attempt to exclude from this analysis any returns that accrued because the Schedule 13D filer publicly disclosed its intent after the trigger date but before filing the Schedule 13D – which is not an uncommon occurrence." *See* letter from EIM IV; *see also* Lewis Study II (exhibit to letter from EIM IV). We acknowledge that a press release by a filer disclosing a campaign in advance of a Schedule 13D filing could provide an alternate explanation for abnormal trading volume (and/or abnormal returns) between the trigger date and filing date of an initial Schedule 13D. However, staff reviewed one year of filings and concluded that such disclosures are relatively rare and are thus not likely to meaningfully affect the estimates presented in Table 5. In particular, staff used EDGAR's full text search function to identify initial Schedule 13D filings made in 2021 that included the term "press release," and then reviewed the resulting filings to determine whether the filer disclosed its plans or proposals between the trigger date and filing date of the initial Schedule 13D. (The instructions to Item 7 of Schedule 13D specify that the filer shall file as exhibits to the Schedule 13D, among other things, "copies of all written . . . plans or proposals relating to . . . the acquisition of issuer control, liquidation, sale of assets, merger, or change in business or corporate structure, or any other matter as disclosed in Item 4 [of Schedule 13D].") Staff identified three initial Schedule 13D filings in 2021 for which the filer disclosed the campaign in a press release between the trigger date and filing date (all of which involved a press release made by the filer on the trigger date). None of these filings was included in the sample of Schedule 13D filings analyzed in Table 5 (which includes 101 filings from 2021) based on the sample restrictions that apply to this analysis. Specifically, in two cases, the filings were made on or before the first business day after the amended filing deadline, and in one case the requisite financial information to be included in the analysis was not available for the filing. Overall, given the limited number of filings for which earlier disclosure was identified, we do not believe that identifying and removing such filings from the full eleven-year sample would meaningfully affect the results.

775 *See*, *e.g.*, Nickolay Gantchev & Chotibhak Jotikasthira, *Institutional Trading and Hedge Fund Activism*, 64 MGMT. SCI. 2930 (2018) ("Gantchev & Jotikasthira 2018 Study") (finding that the timing of Schedule 13D share accumulations is closely tied to institutional liquidity shocks, in that activist purchases closely track institutional sales at the daily frequency).

776 See Section IV.C.1.b.i below for a discussion of how filers may adapt to the amended deadline.

777 *See* letters from AFREF II; Better Markets II; SCG & NIRI.

stated that the DERA Memorandum's characterization of selling shareholders as "harmed" was inappropriate and did not account for the benefits these selling shareholders experienced in terms of, for example, price improvement and improved liquidity as a result of the impending activist campaign.[778]

We acknowledge, as mentioned by commenters, that most investors selling shares during the filing window seem to benefit from the impending activist campaign. In particular, as demonstrated in Figures 7a and 7b, we observe a meaningful amount of stock price appreciation during the filing window for non-corporate-action filings, some of which would accrue to selling shareholders. Despite the assertions of a commenter,[779] the analysis in the DERA Memorandum and the similar analysis in this economic analysis do not characterize the trading between the Schedule 13D filer and a selling shareholder as harmful; in both cases, the analyses focus only on trading between informed bystanders (who are not the filer) and selling shareholders. We also acknowledge concerns that it may be inappropriate to construe the failure to benefit from future stock appreciation when selling shares to the filer as a harm to the selling shareholders, given that the stock appreciation in question results from the actions of the filer and, if there is a more limited opportunity to receive some of the economic benefits resulting from their actions, the filer may have a more limited incentive to initiate a campaign. We do not include sales to the

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778 *See* letters from CIRCA IV; EIM IV; Profs. Bishop and Partnoy III. In the economic analysis of the Proposing Release, the Commission made somewhat broader statements about effects on selling shareholders, suggesting that all investors who sell their shares during the 10-day window may be harmed. Commenters addressing the Proposing Release made similar statements regarding the characterization of "harm" being inappropriate and selling shareholders benefiting from the activity underlying the filing. *See* letters from AIMA; CIRCA I; EIM I; ICM; Pershing Square; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; S. Lorne; TRP. Further, some commenters asserted that the notion that these selling shareholders should be able to sell at prices that reflect information in the Schedule 13D filings would entail an unjustified windfall to those selling shareholders, and a transfer of valuable information from the Schedule 13D filer, who expended the effort to research and develop that information. *See* letters from Dodge & Cox; EIM I; ICM; Prof. Gordon.

779 *See* letter from CIRCA IV.

filer in this analysis. Our analysis quantifies the transfer between selling shareholders and informed bystanders that results from the price change between the day of the sale and the day after the filing date. That is, an earlier deadline would potentially benefit these selling shareholders to the detriment of the informed bystanders.

Some commenters addressing the DERA Memorandum indicated that staff provided insufficient evidence of the existence of informed bystanders.[780] One of these commenters added that activists have significant incentives to maintain the confidentiality of their strategies until they are ready to make a public disclosure.[781] We believe the academic studies discussed above support the conclusion that informed bystanders purchase shares in issuers shortly before the filing of Schedule 13D reports pertaining to such issuers. Some of the researchers suggest that filers themselves, in some cases, may leak information about their impending filing; others specifically identify other channels for information leakage unbeknownst to the activist.[782] However, the methodologies used in these studies to identify informed bystanders in specific cases cannot be expanded to reliably identify trades by all informed bystanders in a broad sample. One comment letter suggested that we use Consolidated Audit Trail ("CAT") data in the analysis of "informed" trading but did not specify what methodology we should use.[783] We do not believe this data would allow us to identify which trades may involve a counterparty that

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780 *See* letters from EIM IV (stating that the presence of harmful conduct is assumed, not demonstrated); Profs. Bishop and Partnoy III (stating that the memorandum provides no support "for the assertion that purchasers other than the 13D filer are more informed than sellers during the relevant period").

781 *See* letter from EIM IV; *see also* Lewis Study II (exhibit to letter from EIM IV) (stating that the analysis "assumes that the activist has informed select investors about the upcoming campaign before its public announcement").

782 *See supra* notes 756-760 and accompanying text.

783 *See* Lewis Study II (exhibit to letter from EIM IV) (stating that "DERA could have used consolidated audit trail ('CAT') data that contains information on which traders were participating in the market to estimate a precise measure of the impact but did not do so" and that "the analysis of 'informed' trading is an obvious setting to utilize CAT data"); letter from EIM IV.

benefited from information leakage. We recognize that our own analysis does not directly identify informed bystanders, and may, for example, represent buyers who have learned of the probability of activism through fundamental research. However, we acknowledge those limitations and are unaware of approaches that would allow us to obtain a better estimate of trades by informed bystanders.

Some commenters criticized the DERA Memorandum for failing to describe the likely characteristics or nature of the selling shareholders and their reasons for selling.[784] Some commenters responding to the Proposing Release indicated that it was likely that the selling shareholders were not retail investors but rather sophisticated institutions who could appropriately weigh the possibility that an activist investor may be buying up shares,[785] with one providing an analysis supporting this assertion.[786] We acknowledge that the potential effects of reducing transfers from selling shareholders may be tempered somewhat to the extent the counterparties of the potential informed bystanders are, for example, institutions with liquidity needs, and that there is some evidence that this may be common.[787] However, gains by informed

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784 *See* letters from CIRCA IV (stating that "it is possible that any such shareholder is selling because it needs cash and thus may be helped and not harmed by the availability of activist buyers"); Profs. Bishop and Partnoy III; *see also* Lewis Study II (exhibit to letter from EIM IV) (stating that the analysis "overlook[s] market makers and day traders (trading participants who open and close their position between the proposed deadline and the filing date)" and that such traders "would not be impacted").

785 *See* letters from Profs. Bishop and Partnoy I; CIRCA III; *see also* letter from 65 Professors (suggesting that the Commission could examine whether particular categories of investors are net sellers, and therefore are not harmed in aggregate, during the period prior to the filing of Schedule 13Ds).

786 *See* letter from Profs. Bishop and Partnoy I; s*ee also* Ekkehart Boehmer et al., *Tracking Retail Investor Activity*, 76 J. FIN. 2249 (2021) (introducing the algorithm for identifying retail order flow used in the cited comment letter). We note that questions have recently been raised as to the reliability of this algorithm for producing an unbiased estimate of retail order flow. *See*, *e.g.*, Yashar Barardehi et al., *Uncovering the Liquidity Premium in Stock Returns Using Retail Liquidity Provision* (Working Paper, 2023), *available at* https://ssrn.com/abstract=4057713.

787 Studies have found that Schedule 13D filer accumulations are timed, on average, coincident with institutional selling pressure. *See*, *e.g.*, Gantchev & Jotikasthira 2018 Study.

bystanders may be viewed by some market participants as unfair regardless of the counterparties bearing the other side of these transfers.

Some commenters raised concerns related to the statement in the DERA Memorandum that lessening an informational advantage that some market participants may perceive to be unfair could enhance trust in the securities markets and promote capital formation.[788] In particular, one commenter indicated a lack of evidence that activism is contributing to an erosion of trust in the markets,[789] while another requested evidence that the acceleration of filing deadlines in other contexts changed the investors' behavior or enhanced their level of trust in the market.[790] This commenter did not suggest how we might gather such evidence, however, and trust has been shown to be an important determinant of participation.[791]

One comment letter presented an alternative analysis of the effects on selling shareholders based on the computation of abnormal net selling activity, which they state better "separates any allegedly 'harmed' selling . . . from other trading" than the analysis in the DERA Memorandum.[792] In particular, these commenters categorize trades as either seller-initiated or buyer-initiated in order to compute abnormal net selling. The commenters concluded that there is

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788 *See* letters from CIRCA IV; EIM IV.

789 *See* letter from EIM IV.

790 *See* letter from CIRCA IV.

791 *See* L. Guiso, P. Sapienza, and L. Zingales, *Trusting the Stock Market*, J. OF FIN., 63 (6) (Dec. 2008), at 2557-2600.

792 These commenters used an algorithm from academic studies to categorize trades in the New York Stock Exchange Trade and Quote ("NYSE TAQ") dataset as either seller-initiated or buyer-initiated. They then computed abnormal net selling (seller-initiated volume minus buyer-initiated volume, scaled by total trading volume and converted into a percentage by adjusting for lagged net selling volume and the logarithm of market capitalization) for the days around Schedule 13D filing for a sample of activist events from 2011 to 2021. *See* letter from Profs. Bishop and Partnoy III (further explaining that "if, for every seller-initiated trade, there is an equal and opposite sized buyer-initiated trade, then we cannot meaningfully infer that any alleged 'harm' has occurred. However, if there is a net order imbalance, with more selling activity than buying activity, then we may be able to infer alleged 'harm.'").

no statistically significant evidence of systematic net selling during the five days preceding the filing[793] such that they "cannot meaningfully infer that any alleged 'harm' has occurred."

We note that signing trades as seller- and buyer-initiated is generally intended to reflect which side of the trade is demanding liquidity, as opposed to providing liquidity. Net order imbalances therefore provide information about which type of traders (sellers or buyers) are demanding liquidity on a given day, while the opposite side of any order imbalance is borne by liquidity providers (historically, these would be market makers, but today other investors including high-frequency traders typically play this role). An analysis of net order imbalances in the days around Schedule 13D filings can therefore provide information about wealth transfers on these days between those investors that are demanding liquidity versus those providing liquidity.[794] However, we do not believe that trades that are signed as seller-initiated versus buyer-initiated provides sufficient information about which trades are more likely to involve a buyer that has a one-sided informational advantage because of their knowledge of another investor's share accumulations, which is the focus of our analysis.

In summary, informed bystanders may profit, as a result of information leakages rather than from their own fundamental research or effort to improve the issuer's performance, from a

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793 This analysis in the comment letter focused on the proposed amendment to the filing deadline—five calendar days—rather than five business days. We note that this analysis appears to focus on the five days before a Schedule 13D filing date regardless of the number of days that have elapsed since the trigger date. As such, the window analyzed varies relative to the trigger date rather than consistently representing the sixth to tenth days after the trigger date.

794 That is, we would interpret a lack of systematic net selling in the days before a Schedule 13D filing to indicate that there are no significant transfers between investors demanding liquidity and those providing liquidity as a result of trades during this period and the subsequent price changes. The commenters describe the analysis as identifying the effect on "natural buyers" as opposed to market makers. *See* letter from Profs. Bishop and Partnoy III. We note that the positive but statistically insignificant abnormal net selling these commenters identified on nine out of the 10 days preceding a filing is consistent with academic research cited above finding that Schedule 13D filers time their accumulations coincident with institutional selling pressure. *See supra* note 775.

near-arbitrage opportunity during the window of time between the trigger date and the date on which the filer's beneficial ownership and plans are made public on a Schedule 13D. In this section, we have presented a quantitative analysis based on historical data that, subject to certain assumptions and limitations, provides a reasonable basis to believe that wealth transfers from selling shareholders to potential informed bystanders can be significant under the current rules.

iv. Information Asymmetries and Liquidity

Shortening the Schedule 13D filing deadline and thereby more quickly resolving an information asymmetry between some market participants and the rest of the market is likely to enhance liquidity.

Some commenters to the Proposing Release agreed that a shortened filing deadline would reduce information asymmetries.[795] Others stated that the academic paper cited in the Proposing Release to support the relation between information asymmetry and liquidity is not applicable to the setting at hand,[796] or more generally questioned the basis of statements in the economic analysis of the Proposing Release indicating that the shortened deadline would result in increased liquidity.[797] In response to these comments, we have expanded the literature that we review. We continue to believe that the amendments will reduce information asymmetries and improve liquidity.

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795 *See* letters from ABA; AFREF; Better Markets I; FreeportMcMoRan; NIRI.

796 *See* letters from Profs. Bishop and Partnoy; Profs. Schwartz and Shavell II (referring to Lawrence Glosten and Paul Milgrom, Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Investors, 14 J. FIN. ECON. 71-100 (1985)).

797 *See* Lewis Study I (exhibit to letter from EIM I); letters from 65 Professors; AIMA; Profs. Bishop and Partnoy.

Specifically, empirical and theoretical work point to a linkage between information asymmetry and measures of liquidity such as bid-ask spreads and price impact.[798] Generally, a greater proportion of strategic information-based trading (*i.e.,* trading based on private, or non-public, information) in contrast to "noise trading" (*i.e.,* trading based on, for example, liquidity needs rather than private information) lowers liquidity in an issuer's securities, as other market participants adjust their behavior in light of the risk of adverse selection (*i.e.*, a situation in which the buyer of an issuer's security has more information than the seller, or vice versa, about the true value of the security).[799] In contrast, liquidity should generally increase when there is a lower proportion of information-based trading to noise trading. For example, a reduced risk of trading with the informed bystanders discussed in the previous section may lead liquidity providers to charge lower bid-ask spreads, resulting in higher liquidity.[800]

We would expect the amended deadline to improve liquidity by lowering information asymmetry. While one study finds theoretically mixed results of shortening the filing deadline with respect to liquidity and efficiency during the period prior to the filing, this study does not address the period subsequent to the now-earlier date.[801] Another study shows that empirical

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798 *See*, *e.g.*, Albert S. Kyle, *Continuous Auctions and Insider Trading*, 53 ECONOMETRICA 1315 (1985) (theoretically modeling a market with informed trading to investigate, among other things, the liquidity characteristics of a speculative market); David Easley et al., *Liquidity, Information, and Infrequently Traded Stocks*, 51 J. FIN. 1405 (1996) (investigating, empirically, the economic importance of information-based trading on bid-ask spreads); *see also Order Competition Rule*, Release No. 34-96495 (Dec. 14, 2022) [88 FR 128 (Jan. 3, 2023)] (for further discussion and analysis on the relationship between adverse selection risk and bid-ask spreads).

799 *Id.*

800 *See supra* Section IV.C.1.a.iii.

801 *See* Kerry Back et al., *Activism, Strategic Trading, and Liquidity*, 86 ECONOMETRICA 1431 (2018) (presenting a model of a specialist market with an activist trader and finding that the association between liquidity and a reduced number of days for the activist to trade based on their asymmetric information—which in their model is equivalent to reducing the rate of "noise trading" or uniformed trading during the same trading window—may be indeterminate during the filing window because of competing effects

proxies for liquidity are higher than otherwise on days that the activist is accumulating shares, concluding that this is so both because activists submit limit orders and because activists strategically trade when liquidity is higher.[802] This study also does not address the period subsequent to the now-earlier filing date. Reducing the number of days prior to the filing should reduce information asymmetry in the period after the filing (through the date the disclosure would otherwise have been made) because after the filing is made the information about a filer's holdings and intentions is public. Thus, liquidity should improve in this period.[803]

We expect that liquidity benefits are more likely to be associated with the types of filings that we classify as "non-corporate-action filings," and not with "corporate action filings." Indeed, the abnormal stock return patterns presented in Figures 4 and 5 above demonstrate that the latter are, on average, not associated with a meaningful stock price reaction between the amended deadline and the day after the actual filing date. Because only the non-corporate-action filings seem to be associated with significant new information that is not already incorporated in market prices earlier in the filing window, these are the filings that are likely to be associated with meaningful information asymmetries whose duration could be reduced by the shortened filing deadline. As noted above, about 68 percent of timely non-corporate-action filings, or about 152 initial Schedule 13D filings of this type per year, are currently filed after the amended deadline. Based on this historical filing behavior, we expect that the amended filing deadline to result in earlier public disclosure, and thus an earlier stock price reaction and resolution of the

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related to, for example, the potentially increased proportion of informed to uninformed trades in a shorter filing window versus the decreased information asymmetry regarding the activist's shareholding resulting from less noise trading).

802 *See* Collin-Dufresne & Fos 2015 Study (finding that illiquidity and measures of adverse selection are lower on days that the activist trades, due to market timing and the use of limit orders—*i.e.*, liquidity provision—by activists).

803 *See supra* note 798.

related asymmetric information than would otherwise have been experienced, for approximately this number of filings per year, thus enhancing liquidity.

Some commenters stated that an information asymmetry between the filer and the market should not be viewed as problematic,[804] with some referring to such information asymmetries as simply a feature of a functioning market.[805] Some commenters responding to the DERA Memorandum raised similar concerns about the usage of "information asymmetries" in that document and a potential implication that these information asymmetries were problematic.

We acknowledge that benefits may stem from the information asymmetry between a Schedule 13D filer and the market. The informational advantage of Schedule 13D filers results, in general, from their own expenditures on research and analysis or from their efforts and expenditures to pursue changes at the issuers in which they accumulate these shareholdings. With a reduced ability to receive some of the economic benefits of their actions, the filer may have reduced incentives to initiate a campaign.[806] Consistent with this view, we have expanded our analysis of the potential costs with respect to reduced activism in Section IV.C.1.b below. We have also narrowed the consideration of selling shareholders in the previous section vis-à-vis the Proposing Release to focus on those trading with informed bystanders who are not the filer and yet may profit from the advance knowledge or suspicion of a filer's potential actions, rather than from their own fundamental research or effort to improve the issuer's performance. [807] We have also expanded our consideration of the literature regarding liquidity beyond what was

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804 *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; ICM; Prof. Gordon; Profs. Schwartz and Shavell I; Profs. Schwartz and Shavell II; S. Lorne.

805 *See* letters from EIM I; Profs. Schwartz and Shavell I.

806 *See*, *e.g.*, Sanford Grossman & Oliver Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON 42 (1980)

807 *See supra* Section IV.C.1.a.iii.

considered in the Proposing Release to reflect additional findings pertinent to the setting of activist campaigns.[808] We believe that the literature cited in the Proposing Release still has relevance in considering, for example, the potential impacts of trading by informed bystanders.[809]

b. Costs

An earlier filing deadline for Schedule 13D may affect significant shareholders seeking to affect control of an issuer. There may be indirect effects as well, as we describe below. We also expect the final amendments to impose relatively minor compliance costs on all Schedule 13D filers.

i. Potential Effects on Activism

By shortening the initial Schedule 13D filing deadline, the final amendments may increase costs of activist campaigns. Commenters expressed mixed views as to whether a shortened filing deadline would reduce activism. Some commenters stated that a shortened filing deadline would not significantly impair activism.[810] Others, however, stated that a shortened filing deadline was likely to reduce the number of activist campaigns,[811] and expressed disagreement with statements in the Proposing Release as to why such a reduction or the impact

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808 *See supra* note 801 and accompanying text.

809 *See* Lawrence Glosten & Paul Milgrom, *Bid, Ask, and Transaction Prices in a Specialist Market with Heterogeneously Informed Investors*, 14 J. FIN. ECON. 71 (1985) (presenting a theoretical model of a specialist market with trading by insiders, and describing generally how a specialist must recoup the losses suffered in trades with the well informed by gains in trades with noise traders, and that these gains are achieved by setting a spread).

810 *See* letters from ABA; AFL-CIO; Better Markets I; Labor Unions; SCG; Sen. Baldwin, et al.; *see also infra* note 818 and accompanying text.

811 *See* letters from AIMA; C. Penner and Prof. Eccles; CIRCA I; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell II; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rep. Torres, et al.; Rice Management; S. Lorne; STB; TRP.

of any reduction would be limited.[812] Some commenters indicated that the economic analysis in the Proposing Release could have been enhanced by further consideration of the potential effects on activist campaigns, including a quantitative analysis.[813]

A Quantitative Analysis of Historical Activist Campaigns: Assumptions, Findings, and Limitations

We use the data presented in Section IV.B.3.a.iii above on filers' current patterns of share purchases to provide some insight into the number and type of filings that have historically involved trading between the amended deadline and their actual filing date.[814]

Our analysis focuses on those 3,067 Schedule 13D filings from 2011 through 2021 that we classify as "non-corporate-action filings" (as opposed to "corporate action filings"),[815] which

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812 *See*, *e.g.*, letter from AIMA (stating that the fact that some filers already file within five days "does not justify accelerating the reporting timeline" because it may merely reflect variation in when filers happen to satisfy their "aggregate purchasing goal").

813 *See* letters from 65 Professors; AIMA; B. Sharfman; EIM I; ICM; MFA; Profs. Bishop and Partnoy I; Prof. Hu; Prof. Webber; Rep. Torres, et al.; SIFMA; SIFMA AMG; STB.

814 We also considered investigating the effects of alternate deadlines for reporting the acquisition of meaningful ownership stakes in other countries, as suggested by several commenters. *See*, *e.g.*, Lewis Study I (exhibit to letter from EIM I); and letters from Sen. Baldwin, et al.; WLRK II. However, we concluded that significant differences in rules and practices in other countries as compared to the United States limit our ability to draw direct inferences from the experience of these other countries. Further, we found that confounding events would limit our ability to draw conclusions about the effects of rule changes in these other countries. For example, revisions to Japan's substantial shareholding reporting rules took effect in 2006 and 2007, coincident with the rise of poison pills and the emergence of bear market conditions in Japan. Thus, while activist engagements in Japan declined after 2007, it is difficult to identify the specific role any one of these factors played in this decline. *See, e.g.*, Yasushi Hamao & Pedro Matos, *U.S.-Style Investor Activism in Japan: The First Ten Years?*, 48 J. JPN. INT. ECON. 29 (2018).

815 As discussed in Section IV.B.3.a.iii above, we found that corporate action filings typically reflect one or two off-market transfers of share ownership, very few of which currently occur after the fifth day following the trigger date. We also anticipate that the terms of these transfers are likely agreed upon in advance. We therefore believe that a shortened filing deadline would not significantly impact the investment activities of the filers of corporate action filings. As discussed in Section IV.C.1.viii below, we acknowledge that adjusting to an accelerated deadline could somewhat increase the compliance costs for such filers under the final amendments. As discussed in Section IV.C.1.a, the benefits of a shortened initial Schedule 13D filing deadline are expected to be relatively limited for corporate action filings.

represent about 20 percent of initial Schedule 13D filings during the sample period, per the first row of Table 2.

As in Figures 2, 3a, and 3b and Table 3 above, we further refine the sample of non-corporate-action filings to exclude late filers and filers with no beneficial ownership reported as of the filing date and to adjust for multiple filings on the same date, resulting in a sample size of 2,370 non-corporate-action filings.[816] Our analysis, presented in Table 6, provides information about the characteristics of current campaigns delineated by filers' degree of accumulation of shares as of the amended deadline.[817]

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816 We exclude late filers from this analysis because it is difficult to predict how filers that are not in compliance with the current filing deadline will react to a change in this deadline. See *supra* note 718 and accompanying text for more detail on the sample refinements.

817 These estimates are based on staff analysis of EDGAR filings through programmatic text analysis (to categorize filings, as discussed in Section IV.B.3.a.ii above, to extract the data necessary to determine share accumulation patterns, as discussed *supra* note 719, and to extract the required dates) as well as data from the Audit Analytics, CRSP, and Compustat databases. Estimates of average issuer characteristics (Rows 2 through 5) and campaign-level profit and value measures (Rows 9 through 11) are based on the campaigns for which the required data was available. While data availability varies by row and column of the table, every statistic in the table reflects data for at least 81% of the respective sample of filings. The Amihud illiquidity ratio (in Row 4) is computed as in the Gantchev & Jotikasthira 2018 Study. See *supra* note 692 regarding how we identify the "Prominent Activists" category (for the purpose of computing Row 6). A filer's unrealized gains on the reported equity stake (used to compute the percentages in Row 9) are based on information on their actual purchases and purchase prices for the 60 days prior to the filing as reported in the Schedule 13D filing, as well as the remainder of ownership acquired before those 60 days, which is assumed to be acquired at the average purchase price reported in the Schedule 13D filing excluding any purchases after the trigger date. Unrealized gains are estimated by comparing these purchase prices to the share price the day after the filing from the CRSP database. Abnormal returns (in Row 10) are computed as the difference between an issuer's stock market return and the CRSP value-weighted market index and are presented for the period extending from 20 business days prior to 20 business days after the filing date. Basing the horizon over which the abnormal returns are computed on business days, rather than calendar days, is consistent with existing studies but differs from the graphs presented in Figures 7a and 7b, which present returns based on calendar days around the filing date (and which thus reflect slightly different estimates). For the aggregate estimate of the increase in shareholder value (in Row 12), the estimated average increase in shareholder value per campaign (in Row 11) is used as a proxy for the shareholder value impact of campaigns for which the data required to produce this estimate was unavailable (about 10% to 19% of campaigns in any given category). We may slightly overestimate the number of campaigns falling in Columns 3 and 4 due to the algorithm by which total reported ownership is extracted from filings. *See supra* note 722. As discussed above, we reviewed all of the filings categorized in Column 4 (*i.e.*, in the light grey bars of Figure 3b) manually and determined that 6% of the filings in this column would not have been categorized in this group if our algorithm to extract total reported ownership from the filing was as precise as our manual review of the documents. However, because the average increase in shareholder value for these filings was relatively low, excluding these filings from Column 4 would not have a meaningful impact on our estimate of the aggregate increase in shareholder value for this category.

Table 6

Campaign Characteristics by Degree of Accumulation by Amended Filing Deadline, Annualized (2011-2021)

	Percent of Stake Accumulated by Amended Deadline			
	(1) 100% (full stake)	**(2) <100%**	**(3) <90% subset of (2)**	**(4) <75% subset of (3)**
(1) Average number of campaigns / year	173	42	7	1
Targeted Issuer Characteristics:				
(2) Average issuer size (market cap.)	$916M	$1.5B	$1.8B	$1.8B
(3) Average issuer liquidity (turnover)*	1.2%	1.2%	1.5%	1.5%
(4) Average issuer illiquidity (Amihud illiquidity ratio)**	0.13	0.11	0.09	0.08
(5) Percent issuers in S&P 1500	9.7%	14.3%	15.6%	12.5%
Filer/Campaign Characteristics:				
(6) Percent by a Prominent Activist	29.8%	36.3%	43.6%	56.3%
(7) Average beneficial ownership reported in filing	9.1%	7.3%	8.7%	9.5%
(8) Average percentage of reported ownership stake accumulated after amended deadline	0%	5.9%	19.2%	35.3%
(9) Average percentage of filer's unrealized gains on reported equity stake, as of day after filing date, attributable to shares accumulated after amended deadline***	0%	4.1%	9.1%	22.6%

Table 6 (continued)

Campaign Characteristics by Degree of Accumulation by Amended Filing Deadline, Annualized (2011-2021)

	Percent of Stake Accumulated by Amended Deadline			
	(1) 100% (full stake)	**(2) <100%**	**(3) <90% subset of (2)**	**(4) <75% subset of (3)**
Campaign Value Implications:				
(10) Average return around filing date (cumulative abnormal return, day -20 to 20)	5.7%	8.1%	17.2%	14.4%
(11) Average increase in shareholder value per campaign	$36M	$151M	$222M	$208M
(12) Average aggregate increase in shareholder value across all campaigns combined (based on average number of campaigns per year)	$6.3B/yr	$6.3B/yr	$1.6B/yr	$302M/yr

* Turnover is the average daily trading volume as a percentage of the issuer's shares outstanding, computed over the six-month period before the trigger date.

**The Amihud illiquidity ratio is intended to capture the stock price impact of trading and is computed over the six-month period before the trigger date. See note 817 for more details.

***Unrealized gains estimated for this purpose reflect estimated gains only on the equity stake reported in the Schedule 13D filing (*i.e.*, excludes unrealized gains from any cash-settled derivative instruments, including swaps, to the extent such instruments did not result in beneficial ownership) and are computed as of the day after the filing (*i.e.*, excludes any impact of changes in stock price or additional stock purchases thereafter). See note 817 for more details.

The columns of Table 6 reflect the same subsamples of filings as the corresponding columns of Table 3 above. A similar analysis with respect to the potential effects of a shortened initial Schedule 13D filing deadline on activism was presented in the DERA Memorandum. Whereas the analysis in the DERA Memorandum was based on the proposed five-calendar day deadline, the analysis summarized in Table 6 is based on the five-business day deadline. One commenter stated that the analysis demonstrated that "shortening the deadline should not significantly impede activist campaigns" because "[t]he overwhelming majority of past filers

have acquired at least 75% of their reported stake" by the amended deadline.[818] Another commenter questioned whether the data supporting the findings with respect to the percentage of past filers that completed their share accumulations by the amended deadline is "representative of the broader market."[819] This commenter recommended that the analysis be expanded to focus on campaigns where the activist filer continued its purchases throughout the 10-day window and reported initial beneficial ownership of 10 percent or more.[820]

We acknowledge that the campaigns in our non-corporate-action sample are heterogeneous, and that the percentage of filers that continued to accumulate shares after the amended deadline would vary across subsamples. For example, Row 6 of Table 6 demonstrates that "prominent activists" were somewhat more likely than others to continue to accumulate a significant fraction of their reported beneficial ownership after the amended deadline. Per the commenter's suggestion to focus on filers reporting beneficial ownership of 10 percent or more, we note that Row 7 of Table 6 indicates that the reported initial beneficial ownership was not systematically higher for filers that continue to accumulate shares after the amended deadline in comparison to those that do not. Per the commenter's other suggestion, we note that both Table 6 and Table 5 above do isolate (in Column 2 of each table) the results for those filings that continue to accumulate shares after the amended deadline.

Other commenters, referencing the dollar estimates in the DERA Memorandum, asserted that the analyses demonstrated that the costs of the proposed Schedule 13D filing deadline amendments related to effects on activist campaigns exceed the benefits of the proposed

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818 *See* letter from Better Markets II.

819 *See* letter from CIRCA IV.

820 *Id*.

amendments.[821] One commenter stated that the DERA Memorandum "fail[ed] to adequately quantify the benefits to long-term shareholders of the target issuer in the form of substantially higher share prices."[822] In response to these commenters, we note that the dollar campaign values in rows 11 and 12 of Table 6 do not represent cost estimates of the final amendments. Rather, the values reflect the value creation from the historical campaigns.[823] Interpreting these figures as a cost would require assuming all of these campaigns would have been abandoned under a five-business day filing deadline. Instead, we expect that a five-business day deadline would not have deterred the vast majority of campaigns. Accordingly, we believe that the costs of the final amendments would be significantly less than any of the figures in Table 6 or identified by commenters because we expect that activists will adapt to the amended deadline rather than forgo campaigns. We acknowledge that some activist investors have indicated that the proposed amendments would make them less likely to carry out activist campaigns.[824] Nonetheless, we expect that the vast majority of the value creation reflected in the table above would continue unabated. Results in Row 1 show that 80 percent of campaigns (173 out of 215 campaigns per year) over the period from 2011 to 2021 would not have been affected by a five-business day filing deadline. While the remaining 20 percent (42 out of 215 campaigns per year) could have been affected to some degree, we expect most of these campaigns would still have occurred, as there are several ways activists can adapt to the amended deadline.[825] In particular, as we discuss

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821 *See* Lewis Study II, at 8 (exhibit to letter from EIM IV observing that, historically, "the average rise in shareholder value for a campaign that requires more than five days to develop a position is $128 million"); letters from CIRCA IV; EIM IV.

822 *See* letter from CIRCA IV.

823 The values also do not account for the costs activists incur to conduct the campaigns.

824 *See, e.g.*, letters from CIRCA IV; EIM IV.

825 *See supra* note 724.

below in this section, activists can adapt to a shorter deadline using strategies such as (a) accumulating a smaller stake in the issuer's shares; (b) accumulating shares more quickly; or (c) accumulating an economic stake using other instruments, such as cash-settled swaps or other derivatives. We expect that in most if not all cases, they will do so.

A Literature Review

In considering the implications of a potential reduction in activist campaigns, we have expanded our consideration of the existing literature on activist campaigns, as suggested by commenters.[826] There is a large body of literature finding that activist campaigns are, on average, associated with an economically significant increase in shareholder value (*i.e.*, positive abnormal stock returns) around the Schedule 13D filing or other announcement date.[827] As noted in the

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826 *See* letters from 65 Professors; MFA; Rep. Torres, et al.

827 Measurement windows in most studies range from five to 40 days around the announcement date, with many also considering longer horizons to address concerns about a potential reversal of the returns. *See, e.g.*, Lucian Bebchuk et al., *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015) ("Bebchuk et al. 2015 Study") (estimating an announcement return of about 6% to initial Schedule 13D filings by activist hedge funds from 1994 through 2007, with, on average, no reversal in returns over the following five years); Kedia et al. 2021 Study (demonstrating, in Table IA2 of the Internet Appendix, no reversal over five years of the positive one-year buy-and-hold returns for different subsamples of initial Schedule 13D filings by activist hedge funds from 2004 through 2012, based on a variety of models of benchmark returns); Boyson & Pichler 2019 Study (estimating a buy-and-hold return of about 12% over a holding period averaging 2.7 years to campaigns by hedge fund activists from 2001 through 2012); Martijn Cremers et al., *Hedge Fund Activism and Long-Term Firm Value* (Working Paper, Dec. 13, 2018), *available at* https://ssrn.com/abstract=2693231 ("Cremers et al. 2018 Study") (estimating a return of about 6% around the start of activist hedge fund campaigns from 1995 through 2011, with, on average, no reversal in returns over the following five years); Edward Swanson et al., *Are All Activists Created Equal? The Effect of Interventions by Hedge Funds and Other Private Activists on Long-Term Shareholder Value*, 72 J. CORP. FIN. 102144 (2022) ("Swanson et al. 2022 Study") (estimating returns of 5% to initial Schedule 13D filings in 1994 through 2014, with, on average, no reversal in returns over the following three years); Ed deHaan et al., *Long-Term Economic Consequences of Hedge Fund Activist Interventions*, 24 REV. ACC. STUD. 536 (2019) ("deHaan et al. 2019 Study") (estimating, on an equally weighted basis, returns of 5% to initial Schedule 13D filings by activist hedge funds from 1994 through 2011, with, on average, no reversal in returns over the following two years); Brav et al. 2022 Study (estimating an announcement return of about 5% to blockholdings by hedge fund activists from 1994 to 2018, with, on average, no reversal in returns over the following three years). While much of the academic research has focused on blockholdings by activist hedge funds, other studies have found similar stock returns related to Schedule 13D filings by other types of investors. *See, e.g.*, Ulf von Lilienfeld-Toal & Jan Schnitzler, *The Anatomy of Block Accumulations by Activist Shareholders*, 62 J. CORP. FIN. 101620 (2020) ("Lilienfeld-Toal & Schnitzler

Proposing Release, the literature does not find that these returns reverse in the long term, though the determination of long-term returns is inherently more complicated than measuring short-term returns.[828] Researchers have also found that the degree of impact that these activities have on shareholder value varies significantly with an issuer's market capitalization, with smaller-cap issuers experiencing significantly larger returns (expressed as a percentage) around the disclosure of an activist campaign than larger-cap issuers.[829] Researchers have debated whether

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2020 Study") (estimating returns of 7% to 8% around initial Schedule 13D filings by external shareholders in 2001 through 2016, irrespective of filer type); Swanson et al. 2022 Study (estimating returns of 5% around initial Schedule 13D filings in 1994 through 2014, with no statistically significant difference in the returns around filings by hedge funds versus those by other private activists).

828 *See* Proposing Release at 13885 and *supra* note 827. Several commenters cited a different study than those cited above, with one stating that it "shows the stock price increase is temporary and in fact the company is often in a weaker economic position post-activist intervention." *See* letter from Sen. Baldwin, et al; *see also* letter from Labor Unions. The cited study presents results showing that a measure of firm valuation increases for firms targeted by hedge fund activists relative to a matched sample of similar, non-targeted firms in the year after activists report their ownership, but that there is no statistically significant difference in this metric across the targeted and matched firms over a longer horizon. However, this study does not investigate stock price or stock returns, but instead measures firm valuation as Tobin's Q, which the authors define as ratio of a firm's market value of assets to the replacement value of assets. This metric may therefore reflect changes in a number of factors beyond stock returns, such as changes in debt values and changes in book assets, and cannot be interpreted equivalently to the studies cited above. Further, the results of the matched sample analysis demonstrate that the differential in Tobin's Q diminishes over longer horizons, but not that the improvement among targeted firms is necessarily temporary; it is possible that the gap narrows due to a similar but delayed improvement in the matched control firms. It is also unclear how the study treats targets that are later acquired, which is a common outcome for targeted firms and could bias the long horizon results. Finally, the longer-horizon tests use a different baseline than the shorter-horizon tests (Tobin's Q one year after activists report their ownership is compared to the same metric one year before activists report their ownership, while Tobin's Q five years after activists report their ownership is compared to the same metric five years before activists report their ownership), which may affect the interpretation of the results. *See* Mark DesJardine & Rodolphe Durand, *Disentangling the Effects of Hedge Fund Activism on Firm Financial and Social Performance*, 41 STRATEG. MGMT. J. 1054 (2020) ("DesJardine and Durand 2020 Study") (with matched sample results presented in Table 7). One commenter noted additional concerns with this study. *See* letter from Profs. Bishop and Partnoy II. A different study using a larger sample of hedge fund activist campaigns finds differing results under multiple matched-sample approaches, with a statistically significant increase in Tobin's Q for targeted firms, including over a five-year horizon. *See* Brav et al. 2022 Study (at Table 9, Panel A).

829 *See, e.g.*, deHaan et al. 2019 Study (finding that the average long-term returns around hedge fund activism on an equally weighted basis are driven by the smallest 20% of targets by market capitalization); Brav et al. 2022 Study (documenting a roughly 2-3% announcement return for the largest two terciles of targets of activist hedge funds, compared to a roughly 9% announcement return for the smallest tercile of targets, based on market capitalization). We note that a smaller percentage return for an issuer with a larger market capitalization may imply a larger total dollar impact on shareholder value than that associated with a larger percentage return for a smaller issuer.

the activists' actions are responsible for any of this increase in value. Some researchers argue that any stock price reaction may instead reflect activists' ability to select issuers that are likely to be taken over or to recover from underperformance for other reasons.[830] However, broader evidence supports the hypothesis that activists' actions are responsible for the vast majority of the increase in value.[831]

There is also academic research on the effect of activist campaigns on investors other than shareholders of the targeted issuers. Studies have associated activist campaigns with a positive effect on the operational and financial performance, as well as shareholder value, of issuers other than the targeted issuers, based on the perceived likelihood of a potential activist

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830 *See, e.g.*, Cremers et al. 2018 Study; deHaan et al. 2019 Study; Yvan Allaire & François Dauphin, *The Game of 'Activist' Hedge Funds: Cui Bono?*, 31 INT. J. DISCL. GOV. 279 (2016).

831 *See, e.g.*, Brav et al. 2022 Study (finding that the outperformance of issuers targeted by activists persists even when benchmarked against a variety of matched control samples, including a control sample of non-targeted issuers that are closely matched to the targeted issuers based on their condition at the time of targeting as well as changes in performance prior to that time); Rui Albuquerque et al., *Value Creation in Shareholder Activism*, 145 J. FIN. ECON. 153 (2022) ("Albuquerque et al. 2022 Study") (estimating that only 13% of the total returns associated with activist campaigns could be attributed to stock-picking ability as opposed to the campaigns themselves); Robin Greenwood & Michael Schor, *Investor Activism and Takeovers*, 92 J. FIN. ECON. 362 (2009) (finding that returns associated with Schedule 13D filings are driven by activists' success at getting target firms acquired, and not just selecting targets that are likely to get acquired); Nicole Boyson et al., *Activism Mergers*, 126 J. FIN. ECON. 54 (2017) (finding that even Schedule 13D targets with failed acquisition bids experience improvements in operating performance, financial policy, and positive long-term abnormal returns); Swanson et al. 2022 Study (finding significant abnormal returns associated with the subsets of Schedule 13D filings presenting a variety of non-sale demands, such as demands associated with corporate strategy, and not just for those presenting demands for a sale of all, or part, of the company). Various studies have also associated activist campaigns with operational improvements. *See, e.g.*, Nicole M. Boyson & Robert Mooradian, *Corporate Governance and Hedge Fund Activism*, 14 REV. DERIVATIVES RES. (2011) (finding an increase in return on assets for issuers that are the subject of hedge fund activist campaigns, relative to similar non-targeted issuers); Alon Brav et al., *The Real Effects of Hedge Fund Activism: Productivity, Asset Allocation, and Labor Outcomes*, 28 REV. FIN. STUD. 2723 (2015) ("Brav et al. 2015 Study") (finding an increase in productivity at the plant level for issuers that are the subject of hedge fund activist campaigns, but not for similar plants at non-targeted issuers); Nickolay Gantchev et al., *Activism and Empire Building*, 138 J. FIN. ECON. 526 (2020) (finding that issuers that are the subject of hedge fund activist campaigns reduce value-destructive acquisition activity relative to similar, non-targeted issuers).

campaign targeting these other issuers.[832] Other research has found that issuers that are the suppliers or close competitors of the targeted issuers, in certain circumstances, experience decreases in shareholder value around an activist campaign, which researchers have associated with cost-cutting and increased efficiency at the target issuer.[833] These effects on suppliers and competitors of targeted issuers are consistent with activism having beneficial competitive effects related to improvements in operational efficiency, as noted by a commenter.[834] Other academic studies have found that activist campaigns have a mixed impact on debtholders of the targeted

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832 *See, e.g.*, Nikolay Gantchev et al., *Governance Under the Gun: Spillover Effects of Hedge Fund Activism*, 23 REV. FIN. 1031 (2019) ("Gantchev et al. 2019 Study") (finding that an interquartile increase in the "threat" of an activist campaign is associated with operational and financial improvements and a 2.4% positive stock return at the issuers with a high perceived "threat" of being targeted); Caroline Heqing Zhu, *The Preventative Effect of Hedge Fund Activism: Investment, CEO Compensation, and Payout Policies*, 17 INT. J. MAN. FIN. 401 (2021) (finding that an increase in the likelihood of an activist campaign is associated with proactive corporate policy changes and improved operating performance in the form of an increase in return on assets).

833 *See, e.g.*, Hadiye Aslan, *Shareholders Versus Stakeholders in Investor Activism: Value for Whom?*, 60 J. CORP. FIN. 101548 (2020) (finding reduced profit margins and stock prices reflecting a negative announcement return of about -1.5% for the suppliers of an issuer targeted by an activist hedge fund relative to suppliers of other issuers and finding that the economic effects on suppliers are stronger for the suppliers of target firms with high cost efficiency or operating margin improvements after the activist campaign); Hadiye Aslan & Praveen Kumar, *The Product Market Effects of Hedge Fund Activism*, 119 J. FIN. ECON. 226 (2016) (finding a negative announcement return for those close competitors of an issuer targeted by an activist hedge fund that do not themselves face the "threat" of activist hedge fund campaign, while those close competitors that do face such a "threat" experience positive announcement returns; and finding that the impact on competing firm performance is stronger for targets with, among other things, a greater improvement in productivity).

834 *See* Lewis Study II (exhibit to letter from EIM IV). Several other commenters also questioned the DERA Memorandum's inclusion of a discussion of shareholders of a target's suppliers and competitors. *See* letters from EIM IV; CIRCA IV. We acknowledge that effects on these shareholders represent transfers rather than market-level economic benefits or costs of activism (e.g., costs to these shareholders may result even when the market benefits as a whole from enhanced operational efficiency and competition). As noted, we refer to the impact on entities other than the target issuer here as evidence that activism can have beneficial competitive effects, rather than to place a primary emphasis on consideration of shareholders of issuers other than the target issuers in determining appropriate disclosure deadlines and related amendments.

issuer, depending on the nature of the campaign's goals and how pursuing those goals would impact both performance and also the level of financial risk of the issuer.[835]

Considerations

Commenters noted that if there are fewer activist campaigns under the amended deadline, there will be reduced shareholder value creation.[836] Commenters also noted that a reduction in activist campaigns would result in decreased corporate accountability and, on average, a reduction in operational efficiency, both because of the reduced direct beneficial effect of activists (on average) on the operations of targeted issuers[837] and because of the reduced indirect beneficial effect of the possibility of becoming a future activist target (or of competition with targeted issuers) on the operational performance of non-targeted issuers.[838] Some commenters

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835 *See, e.g.*, April Klein & Emanuel Zur, *The Impact of Hedge Fund Activism on the Target Firm's Existing Bondholders*, 24 REV. FIN. STUD. 1735 (2011) (estimating that bonds of targeted issuers experience, on average, a negative announcement return of about -4% to activist hedge fund campaigns); Hadiye Aslan & Hilda Maraachlian, *Wealth Effects of Hedge Fund Activism* (Working Paper, 2018), *available at* https://ssrn.com/abstract=993170 (estimating that bonds of targeted issuers experience, on average, a positive announcement return of about 2% to activist hedge fund campaigns, but with variation based on the type of campaign: bondholders benefit the most for those with governance-related goals, while those calling for restructuring the issuer lead to bondholder losses); Jayanthi Sunder et al., *Debtholder Responses to Shareholder Activism: Evidence from Hedge Fund Interventions*, 27 REV. FIN. STUD. 3318 (2014) (examining changes in bank loan spreads upon activist hedge fund campaigns and finding that spreads increase in response to merger-related or restructuring campaigns but decrease in response to those that seek to address governance-related issues).

836 *See* letters from 65 Professors; AIMA; C. Penner and Prof. Eccles; CIRCA I; EIM I; M. Frampton; MFA; Profs. Swanson, Young, and Yust; PSCM; Profs. Eccles and Rajgopal; Rice Management; S. Lorne. One comment letter provided an analysis in which the commenters concluded that "net investors benefit significantly during the relevant time period," estimating a $12 million benefit to net investors per campaign based on their computation of the net order imbalance and stock returns from each day through 30 days after the Schedule 13D filing dates. *See* letter from Profs. Bishop and Partnoy III.

837 See *supra* note 831 for detail on studies that have associated activist campaigns with operational improvements.

838 *See supra* note 832. Reductions in operational efficiency and the associated weakening of competition could result in greater shareholder value at some supplier and competitor firms of potential targets, per the academic research cited above, but this would not represent a market-level benefit. *See supra* note 834. *See also* letters from 65 Professors; AIMA; C. Penner and Prof. Eccles; CIRCA I; CIRCA IV; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell I; Prof. Webber; PSCM; Profs. Eccles and Rajgopal; Rep. Torres, et al.

indicated that activist investors would continue their activities despite reduced profitability.[839] Others indicated that such reduced profitability and the acceleration of potential defensive responses by the target issuer would impede activism.[840] Some commenters indicated that a reduction in the pursuit of activist campaigns and in the disciplining effect on corporate accountability of the possibility of such campaigns would result in reduced market efficiency,[841] a less optimal allocation of resources,[842] reduced liquidity,[843] and reduced trust in markets because managers are not held accountable.[844]

We acknowledge that a reduction in investment research and in significant shareholdings by investors who undertake such campaigns could reduce market efficiency (and thereby the efficient allocation of resources) because of the role that investments based on such research and analysis play in moving stock prices closer to their fundamental values. A reduction in such activities could also reduce liquidity, as noted by commenters,[845] by lessening liquidity provision in the securities market by these investors (through, *e.g.*, limit orders) as they build their stakes. We acknowledge the beneficial effects of activism to the market. However, our analysis of historical data indicates that 80 percent of campaigns were completed by the amended deadline, with 97 percent of campaigns having completed 90 percent of their stakes by the amended

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839 *See* letters from AFREF; Better Markets I; HMA II; SCG; WLRK I.

840 *See* letters from AIMA; CIRCA I; Dodge & Cox; EIM I; ICM; M. Frampton; MFA; Prof. Gordon; Profs. Schwartz and Shavell I; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rep. Torres, et al.; S. Lorne; STB; TRP.

841 *See* letters from AIMA; Dodge & Cox; EIM I; MFA; Profs. Swanson, Young, and Yust; Profs. Eccles and Rajgopal; Rice Management; STB.

842 *See* letters from 65 Professors; EIM I; Rep. Torres, et al.; TRP.

843 *See* letters from AIMA; EIM I.

844 *See* letters from C. Penner and Prof. Eccles; Dodge & Cox; EIM I.

845 *See supra* note 843.

deadline.[846] We therefore expect the majority of campaigns will be largely unaffected by the deadline. In addition, for those campaigns that would be affected by the deadline, we expect the activists will adapt to the shortened deadline and continue to pursue the campaigns, thereby preserving the beneficial effects of their activism.[847]

Some commenters indicated that activist campaigns are not uniformly beneficial, and that the short-term price reaction to such campaigns may not translate into positive shareholder value impacts in the long-term.[848] Some commenters stated that a reduction in such campaigns and the threat of such campaigns could be beneficial because it would reduce the pressure on issuers to make changes in governance, payouts, or investments that are not in the interest of long-term shareholders.[849] One commenter stated that activist campaigns are a deterrent to going public,[850] implying that a reduction in such activities could encourage more companies to enter the public markets. We acknowledge that activist campaigns are heterogeneous. While the average impact of activist campaigns on shareholder value is likely to be positive in the long-term as well as the short-term, [851] some campaigns may have a negative impact on shareholder value either in the short- or long-term. It is possible that some of the activist campaigns that are less likely to occur

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846 *See supra* Section IV.B.3.a.iii, Table 3.

847 Although we believe that activists whose campaigns are impacted by the shortened deadline are likely to adapt and continue with their campaigns, we note that there are costs likely associated with those adaptations, as discussed below. Thus, although the market is likely to benefit from an activist campaign that continues as a result of such adaptations, the costs associated with those adaptations may reduce the extent of such benefits. Nevertheless, because those campaigns would still proceed, the potential reduction in benefits resulting from the costs associated with an adaptation likely would be significantly less than the elimination of all the potential benefits if the campaign were abandoned outright.

848 *See* letters from AFREF; Better Markets I; Labor Unions; NIRI; R. Steel and Prof. Goshen; SCG; Sen. Baldwin, et al.; WLRK I.

849 *See* letters from AFREF; NIRI; SCG; Sen. Baldwin, et al.

850 *See* letter from SCG.

851 *See, e.g.*, Bebchuk et al. 2015 Study; Kedia et al. 2021 Study; Boyson & Pichler 2019 Study; Cremers et al. 2018 Study; Swanson et al. 2022 Study; deHaan et al. 2019 Study; Brav et al. 2022 Study; Lilienfeld-Toal & Schnitzler 2020 Study; Swanson et al. 2022 Study.

after the adoption of the final rules would have decreased shareholder value, such that activists forgoing those campaigns could benefit shareholders. A lower risk of facing an activist campaign could, per the commenter cited above, also be a positive factor in the decision of additional companies to enter the public markets. That said, the final amendments are not intended to discourage activism. Instead, they reflect our attempt to ensure investors receive material information in a timely manner while, at the same time, maintaining the balance between issuers of securities and the shareholders who seek to exert influence or control over issuers that Congress sought when enacting Section 13(d).

Some commenters stated that certain types of activist campaigns were more likely to be forgone as a result of a shortened deadline. For example, some commenters stated that a reduction in campaigns was more likely among those campaigns targeting smaller issuers with lower trading volumes[852] or for certain types of activist campaigns (e.g., those pursuing changes at an issuer rather than a potential sale of the issuer).[853] Some commenters noted that the final amendments may reduce competition among investors who pursue activist campaigns,[854] as more sophisticated and experienced investors may be better able to adapt to the final amendments. We acknowledge that the final amendments may have differential impacts on different types of activist campaigns. For instance, it may be more costly for a filer to accelerate the completion of its stake under a shortened filing window for smaller, less liquid issuers. However, in Table 6 above, we find that the targets of filers who currently continue to accumulate a significant fraction of their stake after the five-business day deadline are, on

852 *See* letters from CIRCA I; ICM; Prof. Gordon.

853 *See* letter from Profs. Swanson, Young, and Yust.

854 *See* Lewis Study I (Exhibit to letter from EIM I); letter from MFA.

average, slightly larger and more liquid than other targets. Further, studies cited earlier in this section find that the abnormal stock returns around the announcement of activist campaigns are lower for larger issuers. These lower expected gains from campaigns at larger issuers could make investors less likely to bear additional costs to conduct such a campaign by one of the adaptation strategies discussed (rather than forgoing the campaign) relative to potential campaigns at smaller issuers even if these costs of doing so are lower than they would be at smaller, less liquid issuers, as noted above.

To summarize, while the amended filing deadline may make a minority of campaigns less profitable and, as a result, could potentially reduce shareholder value creation, we do not expect a substantial reduction in the extent of activism as most historical campaigns would not have been impacted by the amended filing deadline and since activists may adapt to accommodate the amended deadline and we expect that in most if not all cases, they will do so.

Implications of Changes to Activist Campaigns

As referenced above, filers have various ways to adapt to the amended filing deadlines and we expect that many filers will likely use these methods of adaption to the amended filing deadline where they remain incentivized to pursue their campaigns. For example, some filers may proceed with smaller stakes, other filers may accumulate shares more quickly during the amended filing window (or add to their stake after the filing date), while others may acquire an economic interest in the issuer, such as by using cash-settled swaps or other derivatives. We expect that such adaptations are most likely to arise in the context of non-corporate-action filings in which filers would otherwise have continued to accumulate shares on the open market after the amended filing deadline (*i.e.*, campaigns like those represented in Columns 2, 3, and 4 of

Table 6).[855] Some commenters stated that investors have a target share accumulation that would be required to make a campaign worthwhile and that in some cases this target would not be achievable under the amended deadline.[856] One of these commenters noted that investors may file early if they reach their target ownership before the filing deadline, but implied that one should not assume from observing these filings that they can reach their target ownership with the same speed in all instances.[857] We note also that some commenters stated that the proposed five-calendar day filing window would provide activist investors ample time to accrue a significant stake,[858] implying that filers would be able to adapt to the revised deadline. While a filer's adaptation strategy will ultimately be based on its assessment of the benefits and costs of various available strategies, which will likely vary across filers and specific situations, we expect that most of the profitable campaigns will continue to be profitable notwithstanding the five-business day filing deadline. In these cases, we expect activists to use adaptation strategies rather than forgo the campaigns. And, we expect that most campaigns will not be constrained by the amended filing deadline as, historically, 97 percent of campaigns achieved 90 percent of their position by the amended deadline.[859]

The degree to which the benefits associated with earlier disclosure under a shortened filing deadline would be achieved also depends on how the filers respond to the shortened deadline. As an adaptation strategy, some filers may simply proceed with acquiring a smaller stake in an issuer, notwithstanding the reduced potential profits.

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855 As discussed in Section IV.C.1.b.i above, we believe that the process of acquiring shares is unlikely to be significantly impacted in most other cases.

856 *See* letters from AIMA; CIRCA I; ICM; Prof. Gordon.

857 *See* letter from AIMA.

858 *See* letters from ABA; Better Markets I; NASDAQ; SCG; WLRK I.

859 *See* Table 3 and *supra* note 724.

Alternatively, filers could adapt to the amended filing deadline by accumulating shares more quickly during the modified filing window or adding to their stake after the filing date. Such approaches are likely to preserve more fully both the current shareholder value impact of the campaigns and the benefits of earlier disclosure. We acknowledge that these adaptations would entail greater costs to filers because the additional shares would likely be purchased at higher prices than under the current accumulation pattern.[860] Further, in some cases post-filing purchases may be precluded because issuers could react to the disclosure by adopting low-threshold poison pills or other defensive measures. While some commenters suggest that adaptations that rely on accumulating shares more quickly could further reduce market efficiency should volatility increase as a result of aggressive purchasing,[861] we do not believe that a temporary increase in volatility would be disruptive enough to override the benefits to price informativeness mentioned above.

Filers could also adapt by instead acquiring an economic interest in the issuer, such as by using cash-settled swaps or other derivatives.[862] Although these instruments would not replace the ownership of shares in the issuer, and generally do not provide voting rights, they may have the effect of providing economic exposure to the issuer without triggering the Section 13(d)

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860 In the case of stock purchases after an earlier filing date, these shares would be purchased at the higher stock price that prevails after the filing date (*i.e.*, the price reflecting the market's knowledge of the filer's intentions). Accumulating shares more quickly would generally entail purchases at higher prices because, all else equal, larger order sizes or more aggressive trading has greater price impact. *See, e.g.*, Albert S. Kyle, *Continuous Auctions and Insider Trading*, 53 ECONOMETRICA 1315 (1985).

861 *See* letters from AIMA; EIM I; Rice Management; STB.

862 Staff have noted that some Schedule 13D filers already make use of cash-settled derivatives referencing the issuer in which they report beneficial ownership. *See, e.g.*, Memorandum of the Staff of the Division of Economic and Risk Analysis, *Supplemental Data and Analysis Regarding the Proposed Reporting Thresholds in the Equity Security-Based Swap Market* (June 20, 2023), *available at* https://www.sec.gov/comments/s7-32-10/s73210-207819-419422.pdf. Thus, it is plausible that at least some filers could adapt to the amendments by making greater use of these instruments. *See* Security-Based Swaps Release for a discussion of the circumstances in which a holder of a SBS currently may be deemed the beneficial owner of the class of equity securities referenced by the swap.

beneficial ownership reporting obligation. Such economic exposure would allow filers to remain financially incentivized to pursue campaigns that create shareholder value, as opposed to forgoing such campaigns solely due to the shortened filing deadline.

Some commenters indicated that such a heavier reliance by activist investors on derivatives may be an unintended consequence of a shortened Schedule 13D filing window.[863] Adaptations involving the use of derivatives would generally entail some incremental costs to these investors because of the premiums charged by counterparties for these products, and, as noted, would not provide the investors with voting rights beyond those associated with any shares they otherwise beneficially own. That said, such approaches may often be the most cost-effective alternative for activist investors and may preserve the shareholder benefits associated with the campaigns.

An increased reliance on these products may, in certain situations, reduce the overall benefits associated with a shortened filing deadline by reducing the likelihood that disclosure of economic interests would occur any earlier than under the status quo. In particular, cash-settled swaps and related derivatives do not generally give rise to beneficial ownership as they do not generally provide voting or disposition rights over the reference securities.[864] They therefore generally fall outside the scope of the primary purpose of the Schedule 13D filings and the Section 13(d) beneficial ownership reporting system, which are focused on disclosure of a filer's accumulation of equity securities that provide rights that could allow the filer to control or influence control over an issuer. Nevertheless, it is possible that some market participants may look to Schedule 13D filings (in particular, Item 6 of Schedule 13D) for information about a

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863 *See* letter from Profs. Swanson, Young, and Yust.

864 *See supra* Section II.B.3.

filer's accumulation of economic interests, such as cash-settled swaps and derivatives without voting or disposition rights. Acquisition of these instruments could allow a filer to obtain more than five percent of economic interest in an issuer's covered class and then, at a later point, cross the five percent beneficial ownership threshold through holding or acquiring equity securities of the covered class—triggering the requirement for a Schedule 13D filing in five business days—at a later date. In this scenario, there is no delay in the disclosure of the information that Schedule 13D filings and Section 13(d) are intended to provide—the beneficial ownership of the equity securities that provide voting and disposition rights. However, the filer does delay disclosure relative to obtaining the purely economic exposure of more than five percent of the issuer represented by the cash-settled swaps or derivatives. As such, an investor's pattern of accumulation of economic interest, relative to when their campaign is revealed to the market, may not differ from that under the status quo. In fact, depending on the degree of reliance on cash-settled derivative securities, complete disclosure of an investor's total economic interest in an issuer may, under the final rules, be reduced or further delayed than under the baseline, such as in cases where, notwithstanding acquisition of these instruments, the investor beneficially owns five percent or less of a covered class and no Schedule 13D filing obligation is triggered. Still, we cannot predict the extent to which investors will adapt by accumulating cash-settled swaps or derivatives in lieu of equity securities, including because cash-settled swaps and derivatives generally represent only an economic interest in the issuer, with no voting rights or disposition rights with respect to the reference securities, and therefore cannot be presumed to be equivalents to equity securities that do provide such rights.

Initial Schedule 13D filings signal to the market that an investor may intend to influence an issuer, often through activism. For market participants that value such signals, regardless of

beneficial ownership, an increased reliance by activist investors on financial instruments that generally do not trigger the Section 13(d) beneficial ownership reporting obligations, such as cash-settled swaps or derivatives, may reduce the overall benefits associated with a shortened filing deadline by reducing the likelihood that disclosure of such information would occur any earlier than under the status quo.

We note that one commenter stated that potential adaptations presented in the DERA Memorandum are "neither cost-free nor viable,"[865] and we recognize that the amended filing deadline may make a minority of campaigns more costly, including as a result of the adaptations. Similarly, we acknowledge that there would be costs, and reduced benefits, to the extent activism is reduced as a result of the final rules. However, we do not expect a substantial reduction in the extent of activism as historical evidence suggests most campaigns would not be impacted by the amended filing deadline.

ii. Compliance Costs

A shortened initial Schedule 13D filing deadline may increase compliance costs for beneficial owners who have an obligation to file an initial Schedule 13D under the final rules. For example, beneficial owners who regularly make significant stock investments could incur a one-time cost to update their information technology systems to monitor securities transactions and generate alerts and reports in time to accommodate the rule change. They may also need to allocate more resources on an ongoing basis to monitor their holdings in accordance with the amended deadline so that they can meet their obligation to file an initial Schedule 13D. In addition, external service providers and advisers may charge higher fees for expedited processing

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865 *See* letter from EIM IV (also stating that potential adaptations "would fundamentally alter how an activist assembles its exposure to a given company in ways that would impair the ability of an activist to pursue a particular campaign").

and/or for weekend services, which may be more frequently required under the final amendments. Compliance costs may increase both in the context of non-corporate-action filings and corporate action filings. The compliance costs could be more significant for some filers (*e.g.*, those with more complex affiliate structures or investment strategies) than others.

Commenters identified additional compliance challenges that may arise as a result of the shortened initial Schedule 13D deadline. For example, some commenters noted aspects of the initial Schedule 13D filing process that have not become simplified as a result of technological advancements, including nuanced legal analysis, drafting of narratives, and certain data collection, determinations, and computations that are accomplished manually or with reliance on external resources.[866] Others noted issues for first-time filers that may be hard to resolve within five business days, such as the processing time (including delays) for receiving EDGAR filing codes,[867] or stated that compliance burdens would be greater for non-institutional filers or smaller institutional filers lacking certain infrastructure or personnel,[868] and that the accelerated filing deadline may require an increased reliance on third parties.[869]

We acknowledge that not all aspects of preparing and submitting an initial Schedule 13D have been simplified by technology, and that the amended filing deadline may increase certain compliance costs given the need to complete these tasks in a shorter timeframe. We also acknowledge that the incremental compliance burdens may be greater for smaller, less experienced filers than for other filers due to their more limited internal resources and expertise in preparing filings. In particular, these filers are less likely to have operational systems and

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866 *See* letters from ABA; Dodge & Cox; IAA; MSBA; STB.

867 *See* letters from MSBA; STB.

868 *See* letters from A. Day; E. Fraser; Perkins Coie.

869 *See* letter from E. Fraser.

processes in place to facilitate compliance with the revised filing deadline. They are also likely to be more reliant on external advisers and service providers, who may charge higher fees for expedited processing and/or for weekend services.

2. Shortened Schedule 13G Filing Deadlines

The final amendments to Rules 13d-1(b), (c), and (d) and Rules 13d-2(b), (c), and (d) shorten the filing deadlines for both initial and amended Schedule 13G filings as well as, in certain cases, increasing their frequency.[870] As discussed in more detail in Section II.A.2 above, under the final amendments, QIIs and Exempt Investors will be required to file an initial Schedule 13G within 45 days after calendar quarter-end if, as of the end of that quarter, their beneficial ownership exceeds five percent (rather than the current deadline of 45 days after the calendar year-end at which beneficial ownership exceeds five percent). The filing obligation for QIIs will be accelerated from 10 days to five business days after month-end if, as of such month-end, their beneficial ownership exceeds 10 percent. Passive Investors will be required to file an initial Schedule 13G within five business days (rather than the current deadline of 10 days) after crossing the five percent beneficial ownership threshold. All three filer types will be required to file a Schedule 13G amendment within 45 calendar days after any calendar quarter-end at which there is a material change in the information previously reported in a Schedule 13G (rather than the current deadline of 45 days after any calendar year-end at which there are "any changes" in the information previously reported). For QIIs and Passive Investors, the requirement to file a Schedule 13G amendment upon exceeding 10 percent beneficial ownership or an increase or

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[870] For the purpose of this economic analysis, we refer to an "increased frequency" of Schedule 13G filings under the final amendments because the frequency of Schedule 13G filings is generally expected to increase overall. However, the frequency of filings will not necessarily increase in all cases. If there is only one material change (or no such change) in the information reported in a Schedule 13G filing over the course of a year, then the reporting frequency generally will be the same as under the current regime.

decrease in beneficial ownership thereafter of more than five percent will be accelerated. Specifically, QIIs will be required to file an amendment five business days (rather than the current deadline of 10 days) after any month-end at which beneficial ownership meets one of these thresholds, while Passive Investors will be required to file an amendment within two business days (rather than the current deadline of "promptly") after beneficial ownership meets one of these thresholds.

A. Benefits

Academic research has provided evidence that at least some Schedule 13G filings contain value-relevant information that is not already incorporated in market prices, as discussed in more detail below.[871] The acceleration of such Schedule 13G filings under the final rules may thus benefit market participants. Specifically, investors and issuers, with earlier access to the information and an updated stock price, may be able to make better-informed investment and resource allocation decisions. At an economy level, this better-informed decision-making may improve the efficiency of resource allocation overall.

Some commenters agreed that the proposed acceleration of beneficial ownership reporting as a whole, including the proposed revisions to Schedule 13G filing deadlines, would make material information available to all investors in a more timely manner.[872] Some commenters also specified reasons that the information in Schedule 13G filings in particular is important to investors and issuers.[873] For example, one commenter stated that there are "significant risks and impacts of large holdings on investors irrespective of the stated intentions

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871 *See infra* notes 883-885 and accompanying text.

872 *See* letters from ABA; AFREF; EEI; FedEx; Freeport-McMoRan; Nasdaq.

873 *See* letters from AFREF; HMA I; Nasdaq; SCG.

of a large position holder," such as the risk of stock price volatility if a large shareholding were to be sold.[874] Another commenter stated that the disclosure of beneficial owners in Schedule 13G filings, together with Schedule 13D filings, "help inform the education and advocacy efforts of those with a stake in . . . important votes."[875] Other commenters indicated that information about all large shareholders facilitates issuer efforts to identify and engage with these shareholders in order to elicit their views and ideas.[876]

On the other hand, some commenters stated that they do not believe there is a "harmful" information asymmetry or other problem that justifies an acceleration of the Schedule 13G deadlines,[877] or indicated that the earlier disclosure of the information in Schedule 13G filings would be of limited, if any, benefit.[878] For example, some indicated that the concerns that could justify accelerating Schedule 13D filings would not equally apply to Schedule 13G filings.[879] Some commenters stated that the information in Schedule 13G filings is unlikely to be material because of the passive intent of the filers[880] or because of existing disclosures (such as Schedule 13F or Form N-PORT[881] for some QIIs, or registration statements for some Exempt Investors) that provide similar information.[882]

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874 *See* letter from HMA I.

875 *See* letter from AFREF.

876 *See* letters from Nasdaq; SCG.

877 *See* letters from ICI I; MFA; MSBA; SIFMA; SIFMA AMG; SSC; TIAA; TRP.

878 *See* letters from ABA; MFA; TRP.

879 *See* letters from ICI I; MSBA; SIFMA; TIAA.

880 *See* letters from ABA; MFA; MSBA; STB.

881 Though a commenter referenced Form N-Q, we note that this form has been rescinded and similar information is now disclosed in Form N-PORT.

882 *See* letters from ABA; MFA; SIFMA AMG.

Given commenters' statements regarding a lack of material information in Schedule 13G filings and limited benefits from the acceleration of these filings, we reconsidered the evidence on the market impact of these filings. Initial Schedule 13G filings by hedge funds in particular have consistently been associated by multiple academic studies with, on average, a statistically significant positive stock price reaction around the filing date.[883] Similarly, one study found that all initial Schedule 13G filings that are not submitted 45 days after the end of the calendar year (*i.e.*, generally Schedule 13G filings by Passive Investors, including some hedge funds, which are required to be made within 10 days of the trigger date) are associated, on average, with a statistically significant stock market reaction.[884] This study also finds that initial Schedule 13G filings submitted 45 days after the end of the calendar year (*i.e.*, generally Schedule 13G filings by QIIs and Exempt Investors, which include some hedge funds) are not associated with a

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883 *See, e.g.*, Albuquerque et al. 2022 Study (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of about 1.2% over the period from 30 days before to 10 days after the filing date); Alex Edmans et al., *The Effect of Liquidity on Governance*, 26 REV. FIN. STUD. 1443 (2013) ("Edmans et al. 2013 Study") (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of 0.8% over the period from one day before to one day after the filing date); and Christopher Clifford, *Value Creation or Destruction? Hedge Funds as Shareholder Activists*, 14 J. CORP. FIN. 323 (2008) ("Clifford 2008 Study") (finding that Schedule 13G filings by hedge funds are associated with an average cumulative abnormal return of 1.6% over the period from two days before to two days after the filing date, and that there are similar positive cumulative abnormal returns around the filing date for filings submitted within 10 days of the trigger date and for all Schedule 13G filings by hedge funds regardless of the timing of the filing). These researchers vary in their interpretation of these results, with some attributing the positive returns to a governance role of the filers (*i.e.*, a contribution to the promotion of corporate accountability) and others asserting that the positive return may be a reflection of the market's view of the filers' stock-picking ability. There may be further potential explanations for the market reaction. For example, the presence of certain significant shareholders (*e.g.*, an investor known to pursue activist strategies at some of the issuers in which they invest, or an institutional investor known to have voted in the past in favor of changes proposed by activists) could provide information about the likelihood of a future activist campaign or the likelihood of success of such a campaign. *See, e.g.,* Kedia et al. 2021 Study (finding that the composition of institutional ownership of an issuer is associated with both the likelihood of being targeted by an activist campaign and the outcomes of such campaigns).

884 *See* Albuquerque et al. 2022 Study (finding, in a sample of all Schedule 13G filings from 1996 to 2016, that Schedule 13G filings that are not made 45 days after calendar year-end, but are instead made on any other day, experience a statistically significant cumulative abnormal return of 0.59% around the filing date).

meaningful stock market reaction on average.[885] It is unclear whether this finding with respect to post-year-end filings, in contrast to the findings with respect to other Schedule 13G filings, is attributable to the different types of persons filing on a calendar-year-end filing schedule or by an effect of the year-end filing schedule itself on the significance of the information to the market by the time it is reported on Schedule 13G. Overall, this and other studies provide support for commenters' assertions that at least some Schedule 13G filings contain market-moving information.

Some commenters stated that any benefits of the proposed filing deadlines would be limited due to an increase in inaccurate filings as a result of the accelerated preparation of filings or due to a risk of information overload from the increased number of filings.[886] The filing deadlines we are adopting in the final amendments for Schedule 13G require, in many cases, less frequent filing, and provide longer windows prior to filing, than the proposed filing deadlines. Accordingly, the adopted filing deadlines, as compared to the proposed filing deadlines, may mitigate the risk of inaccurate filings or information overload suggested by commenters.

One commenter stated that the Commission did not address "*which* investors stand to benefit" from the proposed accelerated filing deadlines, and indicated that, while retail and long-term investors would not benefit, "sophisticated short-term professional investors" would profit at the expense of the investors filing Schedule 13G.[887] While we are unable to predict with a reasonable degree of confidence which specific investors or categories of investors are likely to benefit most from the acceleration of disclosures, we note that the revisions to the final deadlines

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885 *See* Albuquerque et al. 2022 Study (finding, in sample of all Schedule 13G filings from 1996 to 2016, that the cumulative abnormal return around the filing date for all such filings made 45 days after calendar year-end is not distinguishable from zero).

886 *See* letters from MFA; NVCA; STB.

887 *See* letter from TRP.

relative to the proposed amendments in many cases should mitigate the commenter's concern that the benefits would accrue primarily to short-term traders at the expense of Schedule 13G filers.[888] In particular, as discussed below, the lower frequency of disclosure and increased filing windows being adopted, relative to the proposed amendments, should reduce the risk that parties (including short-term professional investors) profit by anticipating and "front-running" the trades of the filer.[889] We also acknowledge that the benefits are likely to vary across filings, across filer types, and across issuers. For example, there may be lower benefits in cases where alternate, existing disclosures provide similar information on a similar timeframe, such as with respect to QIIs that also file Form 13F.

The economic analysis in the Proposing Release also indicated that the proposed frequency of Schedule 13G filings could have particular informational benefits resolving a concern whereby, currently, QIIs and Exempt Investors may avoid beneficial ownership reporting by selling down their positions by the end of the calendar year.[890] Some commenters indicated that statements in the Proposing Release that investors may currently avoid beneficial ownership reporting in this way were unsubstantiated or inconsistent with their experience.[891] We acknowledge that it is unclear whether and to what extent investors sell down securities holdings before calendar year-end to avoid beneficial ownership reporting, as well as what motives would be likely to drive such behavior, particularly given that many filers would likely be required to disclose such holdings before year-end on other forms and schedules in any event. We are unable to undertake a systematic quantitative analysis of such behavior because we can

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888 *See* letter from TRP.

889 See Section IV.C.2.b below for further discussion of "front-running" risks.

890 *See* Proposing Release at 13882.

891 *See* letters from ICI I; SIFMA; TIAA.

only observe holdings that are sold before year-end when they are reported on Form 13F or through other disclosures, which are precisely the situations that present less of a concern with respect to the lack of a Schedule 13G filing during that period. We also acknowledge that it is unclear how material any information about the filers' beneficial ownership may be in these cases in light of the short-term or transient nature of this ownership and the academic research discussed above.[892] That said, by requiring disclosure at the end of a quarter, the final amendments may reduce the opportunities to avoid a Schedule 13G filing, which could elicit incremental value-relevant information to the benefit of market participants as more filings are disclosed.

b. Costs

All Schedule 13G filers may incur one-time compliance costs to update their systems and processes to comply with the revised filing deadlines, such as updating any information technology systems used to monitor beneficial ownership and generate associated alerts and reports. All such filers are also likely to incur incremental ongoing compliance costs to review beneficial ownership on a more frequent basis and potentially (to the extent that there are material changes in the information previously reported) prepare more frequent Schedule 13G filings. These ongoing costs may include costs associated with gathering information from multiple sources, determining whether changes are material, and, if changes are deemed to be material, drafting a filing, validating its content, obtaining signatures, processing the filing into the required format (via internal personnel or an external EDGAR filing agent), and submitting

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[892] See *supra* note 885 regarding research finding no significant stock market return, on average, around year-end filings of Schedule 13G. See also *supra* note 883 regarding potential reasons for a significant stock market reaction around some Schedule 13G filings, all of which would be weakened in the case of a short-term or transient holding.

it. In addition, filing agents (and potentially other external advisers) may charge higher fees for expedited processing and/or for weekend services, which may be more frequently required (particularly for Passive Investors) under the accelerated deadlines.

Some commenters, although not expressly distinguishing between the Schedule 13D and Schedule 13G requirements, stated that they did not expect the proposed accelerated deadlines to be overly burdensome on filers,[893] with one stating that filers are "highly likely to be sophisticated and experienced investors with the proper resources to file promptly."[894]

Other commenters stated that they expected significant increases in compliance burdens from the proposed Schedule 13G filing deadlines which were not sufficiently accounted for in the Proposing Release, citing, for example, the significant increase in the required frequency of reporting and of monitoring holdings;[895] that many investors must file Schedule 13G for many different issuers;[896] and that filers may not already have the required systems in place or have access to the required infrastructure and personnel to comply.[897]

Some commenters also noted various practical challenges that would make it difficult to complete all of the required steps to submit an accurate Schedule 13G within the proposed filing windows (*i.e.*, five business days, five calendar days, or one business day), such as steps that require manual work or cannot be expedited through the use of technology;[898] constraints with respect to the availability and system capacity of any outside staff or services that are used;[899]

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893 *See* letters from Anonymous 10; Freeport-McMoRan; J. Soucie.

894 *See* letter from Freeport-McMoRan.

895 *See* letters from ABA; ICI I; MFA; SIFMA AMG.

896 *See* letters from IAA; ICI I; MFA.

897 *See* letters from ICI I; SIFMA; SIFMA AMG.

898 *See* letters from E. Fraser; IAA; MSBA; STB; TIAA.

899 *See* letters from MSBA; STB.

issues related to the necessary involvement of multiple parties, entities, or signatories;[900] and a lack of sufficient time to validate the content of the filing.[901] Some commenters noted that first-time, non-institutional, or smaller filers may face particular challenges in complying with the proposed filing deadlines.[902]

In response to the concerns about compliance costs and challenges related to the proposed amendments, we note that, for QIIs and Exempt Investors, the final amendments require a lower frequency of initial and amended filings (generally quarterly as opposed to monthly) and allow more time to prepare filings (45 calendar days as opposed to five business days) as compared to the proposed amendments. Many of these filers (about 84 percent of QIIs and 10 percent of Exempt Investors in 2022, per Table 4 above) already file Form 13F on a similar schedule. As indicated by some commenters,[903] filers may thus be better equipped to assess their holdings and (potentially) prepare Schedule 13G filings on a quarterly schedule. Further, under the final amendments, QIIs should be able to monitor beneficial ownership that could exceed 10 percent of a covered class (or, thereafter, change by more than five percent) on a monthly basis, as they do now, rather than daily, as may have been required under the proposed amendments. Passive Investors will also be permitted to submit most Schedule 13G amendments on a quarterly cadence (rather than monthly, as proposed), with 45 calendar days (rather than five business days, as proposed) after the end of the period to submit the filings, though their initial filings will be required within five business days after the trigger date (rather than five calendar days, as proposed). They will also be permitted to file a Schedule 13G amendment

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900 *See* letters from MSBA; SSC; STB.

901 *See* letters from ABA; MFA; SSC; STB.

902 *See* letters from E. Fraser; ICI I; MFA; MSBA; STB.

903 *See* letters from IAA; ICI I; SIFMA; SIFMA AMG; SSC; TRP.

within two business days of their holdings exceeding 10 percent of a covered class (or, thereafter, for changes of five percent or more), rather than one business day, as proposed. Finally, to provide time to implement the new Schedule 13G filing deadlines, compliance is not required until September 30, 2024.

We acknowledge that the incremental compliance burdens of the revised deadlines may be greater for smaller, less experienced filers than for other filers due to their more limited internal resources and expertise in preparing filings. In particular, these filers are less likely to have operational systems and processes in place that would facilitate compliance with the revised filing deadlines. The compliance burdens may be greatest for smaller, less experienced Passive Investors when filing an initial Schedule 13G, as these investors may, for example, be most likely to incur fees for expedited processing and/or for weekend services given the revised deadline for their filings (five business days after the trigger date) and their likely reliance on external advisors and service providers. That said, all of the changes relative to the proposed amendments should at least partially mitigate commenters' concerns about compliance costs and challenges discussed above, including for first-time, non-institutional, or smaller filers. For example, under the Proposed Amendments, Schedule 13G filers could have been required to file as many as 12 amendments per year under the month-end filing deadline in Rule 13d-2(b). Under the final amendments, however, Schedule 13G filers' burdens may be significantly lower, as the quarter-end filing deadline in amended Rule 13d-2(b) results in a maximum of four amendments per year pursuant to that rule.

We also acknowledge that the accelerated Schedule 13G filing deadlines may give rise to incremental free-riding and front-running risks. That is, there is a risk that more frequent filings with a shorter filing window may reveal a filer's proprietary information or trading strategies to

other market participants, thus allowing those participants to "free ride" by copying the filer's strategies without incurring the same cost as the fund to research, identify and devise profitable strategies.[904] Further, more frequent filings with a shorter filing window could also allow other investors to better anticipate trades of the filers. These other investors may attempt to "front run" or trade ahead of filers to capture any impact on the prices of traded securities.[905] Any increase in free-riding and front-running may ultimately diminish a filer's investment returns and thus harm the filer and any clients or investors of the filer. Such risks may also reduce incentives to engage in research and analysis about potential shareholdings or to pursue some investment opportunities, which may reduce market efficiency and the efficient allocation of capital to its most productive uses. Any related reduction in the number of significant shareholders of issuers may also reduce the operational efficiency of affected issuers, due to the role large shareholders may play in the promoting of corporate accountability either through direct monitoring of management or the threat of exiting an investment.[906]

Some commenters disagreed with the Commission's statement in the Proposing Release that the risks of front-running and free-riding associated with the proposed Schedule 13G filing

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904 *See, e.g.*, Marno Verbeek & Yu Wang, *Better than the Original? The Relative Success of Copycat Funds*, 37 J. BANK. FIN. 3454 (2013) (studying potential free-riding behavior and finding that some funds duplicate the disclosed asset holdings of actively managed mutual funds, and that free-riding on the portfolios disclosed by "past winning funds" generates significantly better performance net of trading costs and expenses than the vast majority of mutual funds).

905 *See, e.g.*, Sophie Shive & Hayong Yun, *Are Mutual Funds Sitting Ducks?* 107 J. FIN. ECON. 220 (2013) (studying potential front-running behavior and finding that hedge funds trade on expected mutual fund flows, and that this type of anticipatory trading is stronger after 2004 when quarterly portfolio disclosure was required of mutual funds).

906 *See, e.g.*, Edmans et al. 2013 Study (finding that initial Schedule 13G filings are followed by improvements in operating performance and associating this relation with the role of significant shareholders); *see also* Alex Edmans & Clifford Holderness, *Blockholders: A Survey of Theory and Evidence*, 1 HANDB. ECON. CORP. Gov. 541 (2017); Andrei Shleifer & Robert Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461 (1986).

deadlines were likely to be low,[907] raising concerns that both the proposed frequency of reporting and the proposed filing windows (*i.e.*, five business days, five calendar days, or one business day) would lead to significant risks of revealing proprietary trading strategies and, because disclosure may be required while trades or trading strategies are still in progress, of facilitating predatory trading.[908] We believe that the revised deadlines in the final amendments relative to the proposed amendments should reduce these risks, particularly for filers that are already reporting holdings on a similar timeframe on Form 13F. That said, confidential treatment requests for Form 13F filings that may allow some filers to defer disclosing some or all of their holdings on that form[909] are not available for Schedule 13G filings, so even Form 13F filers and their clients may bear some additional risk of free-riding and front-running when filing Schedule 13G.

There could also be negative effects on competition in the market for investment management services from accelerated Schedule 13G filing deadlines, as noted by some commenters.[910] In particular, the free-riding and front-running risks discussed above could reduce incentives for investment managers to construct proprietary investment strategies, and

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907 *See* Proposing Release at 13886.

908 For comments regarding the proposed frequency of reporting, see letters from Dodge & Cox; IAA; ICI I; SSC; TIAA; TRP. For comments regarding the proposed filing windows, see letters from Dodge & Cox; IAA; TRP.

909 For example, information about holdings in reportable securities that would reveal a filer's ongoing program of acquisition or disposition of a reportable security, open risk arbitrage positions, and investment strategies that utilize block positioning may be eligible for confidential treatment with respect to Form 13F for the period of time necessary to effectuate the filer's strategy. *See Section 13(f) Confidential Treatment Requests*, letter from staff of Division of Investment Management (June 17, 1998), *available at* https://www.sec.gov/investment/divisionsinvestmentguidance13fpt2htm.

910 *See* letters from MFA (stating that the proposed Schedule 13G filing requirements would "create more substantial barriers to entry, thereby discouraging new potential entrants to the investment management market"); TIAA (stating that the proposed Schedule 13G filing requirements would put "investment advisers – particularly active advisers – at a real competitive disadvantage" due to "competitors attempting to copy or trade ahead of QIIs' investment strategies and engage in other manipulative trading practices").

any increased compliance burdens may increase barriers to entry. However, for the reasons discussed above, we expect such risks and burdens, and therefore any resulting effect on competition, to be mitigated under the revised filing deadlines as compared to the proposed filing deadlines.

3. Other Amendments

a. Revised Filing Deadline for Schedule 13D Amendments

The final amendment to Rule 13d-2(a) revises the filing deadline for amendments to Schedule 13D to two business days after the date on which a material change occurs, as compared to the baseline requirement that amendments be filed "promptly" after such date.

We believe that replacing the "promptly" requirement with a bright-line, two-business day requirement will provide greater clarity as to when material changes are to be disclosed, which could reduce any current filer confusion. In addition, to the extent that the revised deadline results in earlier disclosure of some Schedule 13D amendments than under the baseline, this deadline may allow the information to be incorporated into market prices earlier, allow market participants to make better-informed investment decisions, and enhance the efficiency of resource allocation at the economy level. For those filers that would not otherwise have filed their amendments within two business days after a material change, the revised deadline for Schedule 13D amendments may somewhat increase compliance costs.

In particular, these filers may bear greater costs due to the need to complete the necessary tasks (including gathering information from multiple sources, determining whether changes are material, drafting and validating the content of the filing, obtaining signatures, processing the filing into the required format via internal personnel or an external EDGAR filing agent, and submitting the filing) more quickly. In addition, filing agents (and potentially other external

advisers) may charge higher fees for expedited processing and/or for weekend services, which may be more frequently required under the revised deadline. There may also be compliance challenges involved in accessing external advisers or coordinating among multiple signatories or parties in a short timeframe. Any such costs and challenges are likely to be more burdensome for small, non-institutional, and less experienced filers with fewer in-house resources. In particular, these filers are less likely to have operational systems and processes in place that would facilitate compliance with the revised filing deadline and are likely to be more reliant on external advisers and service providers. The compliance costs and challenges are also likely to be greater for institutional filers with more complex business organizations, including those with sub-advisory relationships common in the investment management industry.

One commenter asserted that the "promptly" standard under Rule 13d-2(a) has "generally been understood" to mean within two business days.[911] Accordingly both the benefits and costs of the revised deadline for Schedule 13D amendments will likely be limited in the case of Schedule 13D amendments that would have been made within two business days even in the absence of the final amendments. Some commenters questioned whether a revised deadline for Schedule 13D amendments would materially improve the information available to investors and other market participants,[912] with two commenters questioning the benefits with respect to specific subsets of filers[913] and one stating that "there have been very few, if any, abuses

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911 *See* letter from EIM I.

912 *See* letters from AIMA; NVCA; STB. One of these commenters specified that, in the context of venture capital funds making distributions of shares to their limited partners, a one-business day filing deadline would risk "erroneously signaling a sell-off to the market," harming liquidity and market efficiency, particularly for thinly traded companies that are more likely to be dominated by retail investors. *See* letter from NVCA.

913 *See* letters from NVCA; STB.

associated with the current 'promptly' regime and . . . it has worked well and effectively."[914] We acknowledge that the extent of any benefits of the revised deadline are likely to vary across filers, types of filings, and issuers, with greater benefits associated with those Schedule 13D amendments that have more of a market impact (*e.g.*, because they report a more significant change in holdings or plans) and that also would otherwise have been filed a greater number of days after the material change.

The proposed amendments would have required amendments to Schedule 13D to be filed one business day after the date on which a material change occurs. Many commenters raised concerns about compliance challenges and costs associated with the limited time that would be available to consider the need for, prepare, and submit a filing under this proposed deadline.[915] While some of the commenters raising such concerns indicated that more than two days may be required to complete the required tasks,[916] some identified a two business day deadline as a more practicable period for compliance.[917] We agree with these commenters and therefore expect that the revision of this filing deadline to two business days, rather than one business day, after the date on which a material change occurs will mitigate some concerns about difficulties in complying with the amended deadline.

b. Amendments to Item 6 of Schedule 13D

The final amendment to Item 6 of Schedule 13D makes explicit that cash-settled derivative securities (including cash-settled SBS) that use the issuer's securities as a reference security are included among the types of contracts, arrangements, understandings, and

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914 *See* letter from AIMA.

915 *See* letters from ABA; AIMA; IAA; ICI I; EEI; EIM I; Hoak; MFA; MSBA; NVCA; Perkins Coie; STB.

916 *See* letters from AIMA; ICI I; STB.

917 *See* letters from IAA; EIM I; Hoak; NVCA; Perkins Coie.

relationships that must be disclosed under that Item. This final amendment will not change the treatment of derivative securities for the purpose of determining beneficial ownership. To the extent that this final amendment elicits additional disclosure that may not otherwise have been provided, investors and the market may benefit from a more complete understanding of all of a filer's interests in an issuer. In particular, this final amendment may provide more information about the overall economic exposure of the filer to the issuer, which may be associated with the actions the filer may be expected to take and thus the shareholder value impact associated with the filing.[918] However, filers could incur additional compliance costs to the extent that they have not already been providing such disclosure. In particular, filers may need to expend additional internal resources and/or consult external advisors to draft the required disclosures and to monitor interests in cash-settled derivative securities in order to report any material changes. In Section V.C below we estimate for purposes of the PRA that this final amendment will impose, on average, an additional 0.1 burden hour per filing.

One commenter indicated that the inclusion of SBS in Item 6 would not provide incremental benefits beyond other disclosures, including disclosures that are under consideration in a different proposed rulemaking.[919] We continue to believe that, given current disclosure requirements, the final amendment to Item 6 may elicit additional disclosure that may not otherwise have been provided. Further, to the extent some of this information may be made public in other documents, investors may benefit from being able to review all of a filer's interests in an issuer in a single location.

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[918] *See, e.g.*, Lilienfeld-Toal & Schnitzler 2020 Study (suggesting that the percentage of beneficial ownership reported in Schedule 13D is an indicator of the types of actions the filer may be expected to take and finding that this percentage is a statistically significant predictor of the announcement returns around the filing date).

[919] *See* letter from IAA; *see also* Schedule 10B Proposal.

c. Structured Data Requirement for Schedules 13D and 13G

The final rules require all disclosures reported on Schedules 13D and 13G other than the exhibits to be submitted using 13D/G-specific XML. We continue to believe, as discussed in the Proposing Release, that requiring the disclosures in a structured, machine-readable data language will improve the public dissemination and accessibility of the information in these disclosures by facilitating its extraction and analysis. Some commenters agreed that a structured data requirement would enhance the benefits of the disclosures by making the information easier to access and analyze.[920]

We expect that the structured data requirement will impose some incremental compliance costs on filers. In Section V.C below we estimate for purposes of the PRA that these requirements will impose, on average, an additional 0.5 burden hour per filing. One commenter expressed concern that structured data requirement would be unduly burdensome for small beneficial owners.[921] Filers will have the option of using a fillable web form that converts inputted disclosures into 13D/G-specific XML, which should limit the incremental burden on filers that elect to use this approach. In particular, we expect that the availability of a fillable web form should, due to its ease of use, mitigate the concern raised by a commenter that the structured data requirement would be unduly burdensome for small beneficial owners. Filers who instead choose to submit filings directly in 13D/G-specific XML may bear implementation costs of establishing related compliance processes and expertise and/or, as one commenter indicated, ongoing costs of working with third-party vendors.[922] Making submissions directly in

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920 *See, e.g.*, letters from ICI I; M. Slavens.

921 *See* letter from A. Day.

922 *See* letter from ICI I.

13D/G-specific XML is an approach that may be more likely to be taken by filers expecting to submit larger numbers of Schedule 13D and Schedule 13G filings, such as QIIs. We expect the costs of submitting Schedule 13D/G directly in 13D/G-specific XML will vary based on prior experience with encoding and transmitting structured disclosures. Per Table 4 in Section IV.B.3.b above, 84 percent of the QIIs filing initial Schedule 13Gs in 2022 were also Schedule 13F filers, and thus have such experience.

One commenter, while supporting the proposed structured data requirement, raised concerns about the additional time necessary to comply with the structured data requirement within the shortened filing windows that were proposed.[923] We acknowledge that the structured data requirement will increase the amount of time needed to submit filings. We believe the extended time permitted to file Schedule 13D and Schedule 13G amendments, and, for QIIs and Exempt Investors, to file initial Schedule 13G filings under the final rules as compared to the proposed deadlines should mitigate some of the concerns raised by this commenter about the time required to comply with the structured data requirement.

d. Amendments to Regulation S-T

The final amendments to Regulation S-T revise the time by which Schedule 13D and 13G filings must be submitted in order to be deemed to have been filed on a given business day from 5:30 p.m. to 10 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, on that day. This change may, on the margin, mitigate the incremental compliance challenges and costs associated with the revised filing deadlines, particularly for filers located in a different time zone than the Commission's principal office or those operating

923 *Id*.

in multiple time zones. Some commenters agreed that these extended filing hours would benefit filers in light of the shortened filing deadlines.[924]

The final amendments to Regulation S-T also make temporary hardship exemptions under Rule 201 of Regulation S-T unavailable with respect to Schedule 13D and 13G filings. We expect this change to have no meaningful economic effects as filers will be able to request a filing date adjustment under existing Rule 13(b) of Regulation S-T under similar circumstances as a temporary hardship exemption.[925]

D. Reasonable Alternatives to the Final Rules

We considered many alternatives to the final rules. Some of these are discussed earlier in this release. In this section, we present certain significant alternatives and a discussion of their benefits and costs relative to the final rules.

1. Alternative Filing Deadlines

We considered both earlier and later (and more and less frequent) filing deadlines relative to those that we are adopting. In general, earlier (or more frequent) filing deadlines may have increased the benefits, but also the costs, of the amendments, while later (or less frequent) deadlines would have decreased the costs but also the benefits of the amendments. The economic implications of some alternative filing deadlines (namely, those that were proposed but not adopted) are discussed in more detail above.

With respect to the initial Schedule 13D filing deadline, which will be five business days after the trigger date, we also considered a deadline of greater or fewer days after the trigger date. Additionally, we considered deadlines stated in calendar days as opposed to business days,

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924 *See* letters from IAA; ICI I.

925 Commission staff may grant the request if it appears that the adjustment is appropriate and consistent with the public interest and the protection of investors. *See* Rule 13(b) of Regulation S-T.

which, when applied to the same number of days (*i.e.*, five calendar days), would have the effect of decreasing the number of days a person would have to file an initial Schedule 13D in cases where weekends or holidays fall in the middle of the filing window. In general, a shorter deadline and the resulting earlier disclosures may have increased the benefits discussed above for those non-corporate-action filings that would not already be considered timely with respect to such shorter deadline. A shorter deadline may also have further reduced the risk discussed above of shareholders selling to informed bystanders prior to a Schedule 13D filing (as demonstrated in Figure 6 above), which may have further enhanced trust in markets and capital formation.

However, a shorter deadline may also have increased the number of activist campaigns forgone compared to the amended filing deadlines, due to two effects. First, a shorter deadline would mean that, given current share accumulation patterns, there would be a greater number of potential campaigns for which filers would have to consider whether or not to proceed and if so, how.[926] Second, the likelihood of adapting may decrease if it is more difficult for filers to adapt to an even shorter deadline than that which we are adopting. An increase in forgone activist campaigns may have further reduced shareholder value creation. A reduction in the pursuit of activism may also have related negative effects on operational efficiency, market efficiency, liquidity, and capital formation, as discussed in the context of the adopted deadline above.

In the case of a longer deadline, the implications for the incremental benefits and costs would have been the reverse of those for a shorter deadline. We note that there is no clear breakpoint in either the accumulation pattern of filers or in the abnormal trading volume prior to

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926 *See supra* Figures 2, 3a, and 3b for the percentage of filers that have completed accumulating all, 90%, or 75% respectively of their reported stake by each calendar day after the trigger date.

Schedule 13D filings that could help to support a particular filing deadline, including five-business day deadline we are adopting.

A deadline expressed in calendar days would also have incremental effects beyond a direct effect on the length of the filing window. In particular, such a deadline would decrease the consistency in the total number of business hours that persons would have to continue accumulating shares and to draft and submit a filing after their trigger date.[927] For example, a five-calendar day deadline may represent anywhere from two to five business days depending on the occurrence of weekends and holidays after the trigger date. This inconsistency may distort the campaigns that are pursued by activists or the timing of these campaigns. For example, an activist who crosses the five percent threshold on a Monday would generally have five trading days from the trigger date to accumulate further shares and potentially increase their profits prior to filing and informing the market of their activity. In contrast, an activist who reaches the same threshold on a Friday prior to a Federal holiday on the following Monday would only have two trading days after the trigger date to accumulate shares before making a Schedule 13D filing. Because investors who reach the threshold near a weekend or holiday would thus be at a relative disadvantage, activists may be relatively more incentivized to pursue campaigns at issuers where liquidity conditions (*i.e.,* availability and ease of share purchase transactions) facilitate crossing the five percent threshold early in a week at a lower cost.[928] Any effect of this kind, in turn, would have a detrimental effect on operational efficiency at the market level by influencing which campaigns are more likely to be pursued.

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927 *See, e.g.*, letter from Profs. Bishop and Partnoy III (recommending a five-business day deadline because it would be "consistent with other regulatory and trading practices," and noting that "the unit of analysis in examining trading should be trading days").

928 See Gantchev & Jotikasthira 2018 Study regarding the role of institutional selling demand on the timing of Schedule 13D trigger dates.

A deadline expressed in calendar days could also increase compliance costs, given that external service providers and advisers may charge higher fees for weekend or holiday services, which may be more frequently required under a deadline expressed in calendar days. However, a deadline expressed in calendar days would increase the consistency in the total number of calendar days that persons would have to submit a filing. For example, five business days may represent anywhere from seven to 10 calendar days. If a significant amount of investment, advisory, drafting, or other activities in preparation of a Schedule 13D filing takes place on weekends and holidays, it is possible that this inconsistency in calendar days would advantage some filers over others (*i.e.*, those who are better positioned to work over weekends and holidays versus those who are not).

With respect to the initial Schedule 13G filing deadline for Passive Investors, which will be five business days after the trigger date, we also considered longer and shorter deadlines (and the use of deadlines expressed in business as opposed to calendar days, which would have had the effect of lengthening the deadline for the same number of stated days). A longer deadline would have eased commenters' concerns about the compliance costs and complications for Passive Investors.[929] However, researchers have found that those Schedule 13G filings that are not made 45 days after year-end (*i.e.*, generally Schedule 13G filings by Passive Investors) are associated, on average, with a statistically significant positive abnormal stock return,[930] albeit smaller than that generally found for Schedule 13D filings.[931] This result may imply that at least some of these disclosures contain material information whose earlier disclosure could benefit

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929 *See, e.g.*, letters from IAA; MSBA.

930 *See supra* note 884.

931 *See supra* note 827.

investors (and which may have enhanced the efficiency of resource allocation at the economy level). A longer deadline would have reduced any such benefits. In the case of a shorter deadline, the implications for the incremental benefits and costs would have been the reverse of those for a longer deadline.

2. Tiered Approaches

We considered "tiered" approaches to the initial Schedule 13D filing deadline, in contrast to the uniform approach to the filing deadline being adopted. We considered, for example, maintaining the current 10-day deadline for acquisitions of more than five percent but no more than 10 percent of a covered class while instituting an amended, shorter deadline in cases where beneficial ownership exceeds 10 percent. We also considered whether the deadline for the initial Schedule 13D filing should vary based on a specified characteristic of the issuer of the covered class, such as its market capitalization or trading volume. Finally, we considered maintaining the 10-day deadline for those filers that elect to "stand still" by not acquiring additional beneficial ownership of the covered class once the five percent threshold has been crossed until the corresponding Schedule 13D is filed.

One commenter stated that a tiered approach that would maintain a 10-day deadline for filing a Schedule 13D pertaining to beneficial ownership in micro-, small-, and mid-capitalization issuers "may serve to limit the impact that reforms to Rule 13d-1(a) have on shareholder engagement and monitoring," particularly at micro-, small-, and mid-capitalization issuers where, in the commenter's view, "such effective engagement and monitoring is most necessary."[932] Another commenter suggested requiring persons who cross certain higher thresholds (*e.g.*, a 10 percent beneficial ownership threshold) or who accumulate certain amounts

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[932] *See* letter from ICM.

after crossing the five percent threshold (*e.g.*, an additional three percent) file their initial Schedule 13D on the proposed accelerated timeline, but "allowing investors who trigger Schedule 13D filings for more technical reasons and who are not accumulating stock in connection with a potential activist engagement (e.g., proxy contests or intended take-private activity) to continue filing under the current regime." [933] This commenter also supported maintaining the 10-day deadline for "an investor who crosses the 5% threshold but acquires no additional stock after the initial crossing transaction," stating that "there is no informational disadvantage for existing investors in such circumstances" and that in some cases there is "earlier disclosure by the issuer relating to the [crossing] transaction" and therefore "little purpose [is] served by accelerating the timeline for the investor to prepare its disclosure."[934]

We acknowledge that there is significant heterogeneity in the benefits and costs of the amended filing deadline across different types of filers and issuers. For example, as discussed above, these benefits and costs are likely to vary across "corporate action" as compared to "non-corporate-action" filings,[935] across issuers of different sizes,[936] and by the identity of the filer.[937]

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933 *See* letter from STB.

934 *Id*.

935 See Section IV.B.3.a.ii above for definitions of these terms and Section IV.C.1 above for discussions in which we conclude that both the benefits and costs of the shortened initial Schedule 13D filing deadline are likely to be limited for corporate action filings.

936 Academic research has associated smaller issuer market capitalization with a higher positive abnormal stock return around the filing of an initial Schedule 13D. *See supra* note 829. A higher positive abnormal stock return may imply higher costs if there is less such activism under an accelerated filing timeline but also higher benefits to investors from accelerating disclosure due to the greater importance of the information to the market.

937 Academic research has associated Schedule 13D filers' reputations (based on their financial clout, expertise, or aggressive style of engagement) with the size of the positive abnormal stock return around the filing. *See, e.g.*, C. N. V. Krishnan et al., *The Second Wave of Hedge Fund Activism: The Importance of Reputation, Clout, and Expertise*, 40 J. CORP. FIN. 296 (2016); and Travis Johnson & Nathan Swem, *Reputation and Investor Activism: A Structural Approach*, 139 J. FIN. ECON. 29 (2021). As discussed *supra* note 936, a higher positive abnormal stock return may imply both higher costs and higher benefits of accelerating the filing deadline.

Ideally, a tiered approach would be used to accelerate disclosure specifically in circumstances where the benefits of accelerated disclosure are greater and the costs of accelerated disclosure are lower. However, there are many important dimensions across which the benefits and costs are likely to vary, complicating the task of designing a tiered approach. Further, the subgroups of filings that are associated with the greatest costs under an accelerated filing deadline (and where there thus could be significant advantages of maintaining the 10-day deadline) are also the same subgroups associated with the greatest benefits under an accelerated deadline, while those associated with lower costs are associated with lower benefits.[938] This pattern mitigates our ability to improve the costs of the amendments by implementing a tiered approach.

3. Modify Structured Data Requirement

We considered modifying the proposed structured data requirement for Schedules 13D and 13G. We considered, for example, requiring only the quantitative disclosures reported on Schedules 13D and 13G to be provided in a structured data language. Narrowing the scope of the structuring requirement in this way could simplify the resulting dataset to include only the information that might be used most widely by market participants, analysts, and Commission staff for aggregation, comparison, and analysis, which may better suit those users who wish to focus their analysis on such information and forgo the additional step of filtering out other data. However, the non-quantitative disclosures on Schedules 13D and 13G, such as textual narratives and identification checkboxes, are also likely to be valuable for many data users, including market participants, analysts, and Commission staff, to access and analyze in an efficient and automated manner. In addition, we expect that the incremental cost savings to filers of requiring only the quantitative disclosures to be structured would be low, because filers would only be

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938 See *supra* notes 936-937 for examples of some such subgroups.

forgoing the costs of inputting their textual and checkbox disclosures into fillable web forms (or of tagging those disclosures directly or by means of a filing agent) rather than broader costs associated with structured data implementation more generally. For these reasons, we have determined not to modify the scope of the structured data requirement.

One commenter recommended that the Commission opt for the XBRL data language, rather than creating an XML schema designed specifically for beneficial ownership reporting.[939] This commenter stated that using the XBRL standard, rather than the proposed 13D/G-specific XML requirements, would result in significantly lower costs and greater efficiencies for filers, users of filings, and the Commission, while also enhancing the benefits of a structured data requirement by facilitating improved data quality and the ability to commingle the data with other datasets. We acknowledge that different structured data languages entail different costs and benefits for filers and data users.[940] We believe that 13D/G-specific XML is more suitable than XBRL for Schedules 13D and 13G because it facilitates the use of a fillable form that should result in a lower cost of complying with the structured data requirement compared to XBRL, particularly for smaller and infrequent filers. Under an XBRL requirement, filers (including smaller and infrequent filers) would incur costs and burdens associated with tagging the disclosures (*e.g.*, software licensing costs, time spent applying tags) or with paying a third party to do so. Thus, although some Schedule 13D and Schedule 13G filers, such as those currently subject to Inline XBRL reporting requirements (e.g., filers that are Commission registrants) or that otherwise have experience with XBRL may realize some efficiencies under an XBRL alternative, we believe the cost savings expected to arise from having a fillable form option

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939 *See* letter from XBRL US.

940 See *supra* Section IV.C.3.c for a discussion of costs associated with the 13D/G-specific XML requirements.

under the 13D/G-specific XML requirements would have a more substantial positive impact with respect to filers as a whole.

In addition, while some Schedule 13D and Schedule 13G filers and data users may have familiarity with XBRL data and software, such filers and data users likely also have familiarity with data structured in form-specific XML languages on EDGAR. For instance, the Commission has found the use of form-specific XML on Section 16 ownership reporting forms to have had positive impacts on filers (with respect to compliance costs) and users (in terms of data usability) of those disclosures without imposing significantly higher implementation costs on the Commission than other structured data requirements impose.[941] For these reasons, we are requiring 13D/G-specific XML rather than Inline XBRL for Schedules 13D and 13G.

V. Paperwork Reduction Act

A. Summary of the Collections of Information

Certain provisions of our rules, schedules and forms that will be affected by the final amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 ("PRA").[942] The Commission published a notice requesting comment on changes to these collection of information requirements in the Proposing Release and submitted these requirements to the Office of Management and Budget ("OMB") for review in accordance with the PRA.[943] The hours and costs associated with maintaining, disclosing, or providing the information required by the final amendments constitute paperwork burdens imposed by such collection of information. An agency may not conduct or sponsor, and a person

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941 *See* Securities and Exchange Commission, Office of Structured Disclosure, Insider Transactions Data Sets, *available at* https://www.sec.gov/dera/data/form-345.

942 44 U.S.C. 3501 *et seq*.

943 44 U.S.C. 3507(d); 5 CFR 1320.11.

is not required to respond to, a collection of information requirement unless it displays a currently valid OMB control number.

The title for the affected collections of information is "Regulation 13D and Regulation 13G; Schedule 13D and Schedule 13G" (OMB Control No. 3235-0145). These schedules contain item and other requirements that outline the information a reporting person must disclose.[944] The schedules were adopted under the Exchange Act. A description of the final amendments can be found in Section II above, and a discussion of the economic effects of the final amendments can be found in Section IV above. Compliance with the information collections is mandatory. Responses to the information collections are not kept confidential and there is no mandatory retention period for the information disclosed.

B. Summary of Comment Letters on PRA Estimates

In the Proposing Release, the Commission requested comment on the PRA burden hour and cost estimates and the analysis used to derive the estimates. We did not receive any comment letters in response to the request for comment on the PRA estimates and analysis included in the Proposing Release.

C. Burden and Cost Estimates for the Final Amendments

Below we estimate the incremental and aggregate effect on the paperwork burden as a result of the final amendments. As discussed in Section II above, we have made a number of changes from the Proposed Amendments, and we have adjusted our estimates accordingly. For example, in the Proposing Release, the Commission estimated paperwork burden increases for Forms 3, 4, and 5 as well as Schedules 13D and 13G associated with proposed Rules 13d-3(e) and Rules 13d-5(b)(1)(i), (b)(1)(ii), and (b)(2)(i). Because we are not adopting those proposed

944 *See* 17 CFR 240.13d-101 and 102.

rules, we have adjusted the paperwork burden estimates from the Proposing Release accordingly. In addition, rather than basing our PRA estimates on the actual number of Schedule 13D and 13G filings in calendar year 2020, as the Commission did in the Proposing Release, we base our PRA estimates with respect to the final amendment to Rule 13d-2(b), in part, on the actual number of Schedule 13G filings in calendar year 2022.[945]

At the outset, we note that the current OMB inventory for Regulation 13D-G reflects 8,587 annual responses. This number is based on the number of initial Schedule 13D and 13G filings made. We think that the better approach is for the PRA to reflect the burdens arising from both the initial Schedule 13D and 13G filings and amended Schedule 13D and 13G filings. Accordingly, we first update the existing PRA burden estimates to reflect this new approach. Specifically, we are updating the current OMB inventory from 8,587 annual responses to 29,793 annual responses to reflect the average number of initial and amended Schedule 13D and 13G filings per year that were made in calendar years 2020, 2021, and 2022.[946] We then estimate the PRA impact of the final amendments using the updated inventory numbers as the baseline. Table 1 below illustrates the resulting incremental change to the total annual compliance burden in hours and in costs. Additionally, we note that the current OMB inventory for the above-referenced collections of information reflect an average of hourly rate of $400 per burden hour

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945 *Compare* Proposing Release at 13892, n.273, *with infra* note 952.

946 In calendar year 2020, there were 5,288 Schedule 13D filings (comprised of 1,148 initial filings and 4,140 amendments) and 22,080 Schedule 13G filings (comprised of 6,436 initial filings and 15,644 amendments) for a total of 27,368 filings. *See* DERA Memorandum at nn.3 & 24. In addition, during calendar year 2021, there were 5,434 Schedule 13D filings (comprised of 1,555 initial filings and 3,879 amendments) and 24,874 Schedule 13G filings (comprised of 8,676 initial filings and 16,198 amendments) for a total of 30,308 filings. *See id*. at 1, 8. Finally, in calendar year 2022, there were 5,179 Schedule 13D filings (comprised of 1,161 initial filings and 4,018 amendments) and 26,523 Schedule 13G filings (comprised of 8,433 initial filings and 18,090 amendments) for a total of 31,702 filings. *See supra* Section IV.B.3. Taking the three-year average of these amounts results in an average of 29,792 Schedule 13D and 13G filings per year, comprised of 1,288 initial Schedule 13D filings, 4,012 Schedule 13D amendments, 7,849 initial Schedule 13D filings, and 16,644 Schedule 13G amendments, when rounded to the nearest whole number.

borne by outside professionals. Similarly, in the Proposing Release, the Commission used an estimated cost of $400 per hour, recognizing that the costs of retaining outside professionals may vary depending on the nature of the professional services.[947] The Commission recently determined to increase the estimated costs of such hourly rate to $600 per hour[948] to adjust the estimate for inflation from Aug. 2006.[949] Accordingly, we first update the existing PRA burden estimates to reflect this new cost estimate, as set out in the following Table 1.

PRA Table 1: Change in PRA Burden Due to Updating Inventory Numbers

Current OMB Inventory			Updated Inventory			Increased Burden Due to Update		
Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Updated Annual Responses (D) [±]	Updated Burden Hours (E) [±±]	Updated Cost Burden (F) [±±±]	Increase in Number of Responses (G) = (D) - (A)	Increase in Burden Hours (H) = (E) - (B)	Increase in Cost Burden (I) = (F) - (C)
8,587	27,412	$32,894,000	29,792	40,329	$72,591,600	21,205	12,917	$39,697,000

[±] *See supra* note 946.

[±±] The current OMB inventory reflects an average of 14.5 burden hours for each Schedule 13D filing and an average of 12.4 burden hours for each Schedule 13G filing. As noted above, however, the current OMB inventory only included initial Schedule 13D and 13G filings, and so these average burden hours were estimates with respect only to initial filings. Because Schedule 13D and 13G amendments generally contain a fraction of the information contained in an initial filing and because of the likely efficiencies associated with preparing an amendment based on the information disclosed in an initial filing, we estimate average burden hours per filing of 3 hours per Schedule 13D amendment and 2 hours per Schedule 13G amendment. When applied to the updated average annual number of initial Schedule 13D filings (1,288), Schedule 13D amendments (4,012), initial Schedule 13G filings (7,849), and Schedule 13G amendments (16,644), *see supra* note 946, this reflects a total of 161,315 burden hours (when rounded to the nearest whole number). In addition, the current OMB inventory assumes that 25% of the burden associated with a Schedule 13D or 13G filing is borne by the reporting persons and 75% is borne by outside professionals. Thus, assuming that 25% of the total burden hours associated with Schedule 13D and 13G filings (161,315) is borne by the reporting persons yields a total of 40,329 internal burden hours (when rounded to the nearest whole number).

[±±±] The current OMB inventory reflects a total cost burden of $32,894,000 for Regulation 13D-G, reflecting an

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947 *See* Proposing Release at 13894, n.280.

948 We recognize that the costs of retaining outside professionals may vary depending on the nature of the professional services, but for purposes of this PRA analysis, we estimate that such costs would be an average of $600 per hour.

949 *See Listing Standards for Recovery of Erroneously Awarded Compensation*, Release No. 33-11126 (Oct. 26, 2022) [87 FR 73076 (Nov. 28, 2022)].

average of hourly rate of $400 per burden hour borne by outside professionals. As noted above, we are increasing this cost estimate to $600 per hour. Further, as noted above, assuming that 75% of the total burden hours associated with Schedule 13D and 13G filings (161,315) is borne by the reporting persons yields a total of 120,986 burden hours borne by outside professionals (when rounded to the nearest whole number). As such, we calculate the updated cost burden by multiplying (x) $600 by (y) 120,986.

We believe that the final amendments potentially could increase the number of responses to this updated collection of information for Schedules 13D and 13G. Specifically, although we do not anticipate an increase in this collection due to our final amendment to Rule 13d-1, our final amendment to Rule 13d-2(b) with respect to the standard that requires an amendment to Schedule 13G could potentially increase the number of Schedule 13G amendments filed annually.[950] For purposes of this PRA, therefore, we estimate that there could be an additional 41,679 annual responses to the collection of information under Regulation 13D-G[951] as a result of the final amendment to Rule 13d-2.[952]

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950 For example, Rule 13d-2(b) currently requires that a Schedule 13G be amended 45 days after the calendar year-end in which any change occurred to the information previously reported. Under our amendment to Rule 13d-2(b), a Schedule 13G will have to be amended within 45 days after the end of the calendar quarter in which a material change occurred to the information previously reported. Although an amendment under Rule 13d-2(b) currently is required for "any" change in the information previously reported, that rule only requires that one amendment be filed annually, if at all. Under the revisions we are adopting to that rule, although the standard for determining an amendment obligation would only arise upon a "material" change to the information previously reported, the rule changes could theoretically result in numerous amendments being filed on an annual basis, with as many as four Schedule 13G amendments being filed annually pursuant to revised Rule 13d-2(b).

951 To the extent that a person or entity incurs a burden imposed by Regulation 13D-G, it is encompassed within the collection of information estimates for Regulation 13D-G. This burden includes the preparation, filing, processing and circulation of initial and amended Schedules 13D and 13G.

952 As discussed in Section IV.B.3 *supra*, a total of 18,090 Schedule 13G amendments were filed in calendar year 2022. Upon further review of that data set, we note that 15,100, or 83.47% of those Schedule 13G amendments were made within the first 45 days of calendar year 2022. In addition, we note for calendar years 2020, 2021, and 2022, there were an average of 16,644 Schedule 13G amendments filed each year. *See supra* note 946. Because Rule 13d-2(b) currently has a Schedule 13G amendment deadline of within 45 days after calendar year-end, we assume that 83.47% of the 16,644 Schedule 13G amendments filed each year, or 13,893 filings (when rounded to the nearest whole number), were made pursuant to Rule 13d-2(b). As noted above, our amendment to Rule 13d-2(b) could result in a beneficial owner filing four Schedule 13G amendments annually pursuant to Rule 13d-2(b), as compared to the one annual amendment that currently may be required by Rule 13d-2(b). *See supra* note 950. As such, for purposes of this PRA, we estimate that there will be 55,572 Schedule 13G amendments filed annually pursuant to Rule 13d-2(b) as a result of our amendment (calculated by multiplying (x) the 13,893 annual responses currently attributable

In addition to a potential increase in the number of annual responses, we expect that the final amendments will change the estimated burden per response for Regulation 13D-G. For both Schedule 13D and Schedule 13G filers, we expect that the structured data requirement will increase the estimated burden per response by requiring that the disclosures in those schedules be made using the 13D/G-specific XML. In addition, for Schedule 13D filers, we expect that the final amendment to Item 6 of Schedule 13D potentially could increase the estimated burden per response by specifying that disclosure is required under Item 6 for the use of cash-settled derivative securities with respect to an issuer's securities.[953]

The burden estimates were calculated by estimating the number of parties we anticipate would expend time, effort, and/or financial resources to generate, maintain, retain, disclose or provide information in connection with the final amendments and then multiplying by the estimated amount of time, on average, such parties would devote in response to the final amendments. The following table summarizes the calculations and assumptions used to derive our estimates of the aggregate increase in burden corresponding to the final amendments.

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to Rule 13d-2(b) by (y) four), resulting in 41,679 additional responses to the collection of information under Regulation 13D-G (calculated as the difference between (x) the 55,572 annual responses estimated to be attributable to Rule 13d-2(b) as a result of the amendments and (y) the 13,893 annual responses currently attributable to Rule 13d-2(b)). We note, however, that this estimate likely reflects the upper limit of the potential increases in the number of annual Regulation 13D-G responses as a result of our amendment to Rule 13d-2(b) because (1) the amendment revises Rule 13d-2(b) to require a Schedule 13G be amended only for a "material" change to the information previously reported, as compared to the current requirement that an amendment be filed for "any" change to the information previously reported, (2) the information previously reported by many Schedule 13G filers may not change materially on a quarterly basis, and (3) some of the Schedule 13G amendments filed in the first 45 days of a given calendar year may not have been made pursuant to Rule 13d-2(b).

953 We further expect, however, that this potential increase may be offset in part by the amendment to Item 6 that deletes the "including but not limited to" proviso.

PRA Table 2. Calculation of Increase in Burden Hours Resulting from the Final Amendments

	Schedule 13D Initial Filings (A)	Schedule 13D Amendments (B)	Schedule 13G Initial Filings (C)	Schedule 13G Amendments (D)
Number of Responses [a]	1,288	4,012	7,848	58,323
Burden Hours Per Response [b]	15.1	3.5	12.9	2.5
Column Total [c]	19,449	14,042	101,239	145,808
Aggregate Increase in Burden Hours [d]	119,223			

[a] As noted in PRA Table 1 and *supra* note 946, the updated OMB inventory will reflect 29,793 total Schedule 13D and 13G filings, comprised of 5,300 Schedule 13D filings and 24,493 Schedule 13G filings (in each case comprised of both initial filings and amendments). When taking into account the potential effects of the amendment to Rule 13d-2(b) we estimate that the number of Schedule 13G filings could increase by 41,679, for a total of 66,172 annual Schedule 13G filings. *See supra* note 952.

[b] As noted in PRA Table 1, the current OMB inventory reflects an average of 14.5 burden hours for each Schedule 13D filing and an average of 12.4 burden hours for each Schedule 13G filing. We use these per filing burden hours as a baseline for estimating the burden impact of the final amendments. We estimate that the new structured data requirement will increase the burden per response for Schedule 13D and 13G filings (both initial and amended filings) by 0.5 burden hours. Our assumption is that the burden will be greatest in the first year after adoption, as filers adjust to the new requirements and update their Schedule 13D and 13G preparation and filing processes accordingly. We estimate that the burden of the structured data requirement will be 1 hour in the first year and 0.25 hours in each of the following two years for a three-year average of 0.5 burden hours. Further, for the amendments to Item 6 of Schedule 13D, we estimate they will increase the burden by 0.1 hours for each initial Schedule 13D filing. Although these amendments could, in some cases, substantially increase the amount of disclosure made pursuant to Item 6, we believe that this estimate accurately reflects that only a relatively small percentage of all Schedule 13D filers hold cash-settled derivative securities and, therefore, will be required to make additional disclosures. In addition, we also expect that any increased burden may be offset in part by the amendment to Item 6 that deletes the "but not limited to" proviso. Finally, because not every Schedule 13D amendment will respond to Item 6, we apply this increase only to initial filings. Taken together, we estimate that the amendments could increase the annual burden hours per initial Schedule 13D filing by 0.6 hours and increase the annual burden hours for each Schedule 13D amendment, and each initial Schedule 13G filing and Schedule 13G amendment by 0.5 hours. When added to the current averages, we estimate that, as a result of the final amendments, the new average per filing burden hours will be 15.1 hours for initial Schedule 13D filings, 3.5 hours for Schedule 13D amendments, 12.9 hours for initial Schedule 13G filings, and 2.5 hours for Schedule 13G amendments.

[c] Derived by multiplying the number of responses in each column by the burden hours per response, and rounded to the nearest whole number.

[d] Derived by adding together the hours from "Column Totals" (280,538 hours) and subtracting from that total burden hours associated with Schedule 13D and 13G filings for Regulation 13D-G, as noted under PRA Table 1 (161,315).

The table below illustrates the incremental change to the total annual compliance burden in hours and in costs as a result of the final amendments. The table sets forth the percentage estimates we typically use for the burden allocation for each response.

PRA Table 3. Calculation of Aggregate Increase in Burden Hours Resulting from the Final Amendments

Total Number of Estimated Responses (A)†	Total Increase in Burden Hours (B)††	Increase in Internal Hours (C)††† = (B) x 25%	Increase in Outside Professional Hours (D)††† = (B) x 75%	Increase in Outside Professional Costs (E) = (D) x $600
71,471	119,223	29,806	89,417	$53,650,200

† This number reflects an estimated increase of 41,679 annual responses to the updated Regulation 13D-G collection of information set forth in PRA Table 1. *See supra* note 952 and accompanying text. PRA Table 1 reflects an updated baseline total of 29,792 responses filed annually for Regulation 13D-G.

†† Calculated as the sum of annual burden hour increases estimated for Schedule 13D and 13G filings. *See supra* PRA Table 2, "Aggregate Increase in Burden Hours."

††† The estimated increases in Columns (C) and (D) are rounded to the nearest whole number.

Below we summarize the requested paperwork burden for Regulation 13D-G that will be submitted to OMB for review in accordance with the PRA, including the estimated total reporting burdens and costs, under the final amendments. This table includes both the adjustments to the PRA inventory reflected in PRA Table 1 and the aggregate burden increase resulting from the final rules reflected in PRA Table 3.

PRA Table 4. Requested Paperwork Burden for Regulation 13D-G under the Final Amendments

Current Burden			Program Change			Revised Burden		
Current Annual Responses (A)	Current Burden Hours (B)	Current Cost Burden (C)	Increase in Number of Responses (D)±	Increase in Burden Hours (E)±±	Increase in Cost Burden (F) ±±±	Annual Responses (G) = (A) + (D)	Burden Hours (H) = (B) + (E)	Cost Burden (I) = (C) + (F)
8,587	27,412	$32,894,000	62,884	42,723	$93,347,200	71,471	70,135	$126,241,200

[±] Calculated as the sum of (x) the 21,205 increase in the number of annual responses as a result of the update of the current OMB inventory (from Column (G) in PRA Table 1) and (y) the 41,679 increase in the number of annual responses as a result of the final amendments (*see supra* note 952 and accompanying text).

[±±] Calculated as the sum of (x) the 12,917 increase in the number of burden hours as a result of the update of the current OMB inventory (from Column (H) in PRA Table 1) and (y) the 29,806 increase in the number of burden hours as a result of the final amendments (from Column (C) in PRA Table 3).

[±±±] Calculated as the sum of (x) the $39,697,000 increase in the cost burden as a result of the update of the current OMB inventory (from Column (G) in PRA Table 1) and (y) the $53,650,200 increase in the cost burden as a result of the final amendments (from Column (E) in PRA Table 3).

VI. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act ("RFA")[954] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a) of the RFA generally requires the Commission to undertake an initial regulatory flexibility analysis of all proposed rules, or rule amendments, to determine the impact of the proposed rulemaking on "small entities,"[955] while Section 604(a) requires that the Commission generally provide a final regulatory flexibility analysis of rules it is adopting.[956] Section 605(b) of the RFA states that these requirements shall not apply to any proposed or final rule or rule amendment if the head of the agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[957] The Commission certified in the Proposing Release that the Proposed Amendments would not have a significant economic impact on a substantial number of small entities for purposes of the RFA.[958]

For purposes of Commission rulemaking in connection with the RFA, a small entity

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954 5 U.S.C. 601 *et seq.*

955 Section 601(b) of the RFA permits agencies to formulate their own definitions of "small entities." *See* 5 U.S.C. 601(b). The Commission has adopted definitions for the term "small entity" for the purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in 17 CFR 240.0-10 and, with respect to investment companies, 17 CFR 270.0-10.

956 *See* 5 U.S.C. 603(a), 604(a).

957 *See* 5 U.S.C. 605(b).

958 Proposing Release at 13895-96.

includes: (1) when used with reference to an "issuer" or a "person," other than an investment company, an "issuer" or "person" that, on the last day of its most recent fiscal year, had total assets of $5 million or less;[959] or (2) a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to 17 CFR 240.17a-5(d), or, if not required to file such statements, a broker-dealer with total capital (net worth plus subordinated liabilities) of less than $500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and is not affiliated with any person (other than a natural person) that is not a small business or small organization.[960] An investment company, including a business development company,[961] is considered to be a "small business" if it, together with other investment companies in the same group of related investment companies, has net assets of $50 million or less as of the end of its most recent fiscal year.[962]

A description of the final amendments can be found in Section II above, and a discussion of the economic effects of the final amendments can be found in Section IV above. Although the final amendments will apply to beneficial owners regardless of their size, we believe that the vast majority of the beneficial owners that will be subject to the amendments will not be "small entities" for purposes of the RFA. For example, the amendments to the filing deadlines in Rules 13d-1 and 13d-2, as well as the amendments to Rules 13 and 201 of Regulation S-T and the structured data requirement, only apply to persons who beneficially own more than five percent

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959 *See* 17 CFR 240.0-10(a).

960 *See* 17 CFR 240.0-10(c).

961 Business development companies are a category of closed-end investment company that are not registered under the Investment Company Act [15 U.S.C. 80a-2(a)(48) and 80a-53-64].

962 17 CFR 270.0-10(a).

of a covered class of securities, thus providing a basis to conclude that such a person is unlikely to fall within the definition of "small entity." In addition, to the extent that the final amendments to the filing deadlines apply to members of a group, in addition to individual entities, we believe that members of a group generally would be larger investors and similarly are unlikely to fall within the definition of "small entity."

We did not receive any comment letters in response to the request for comment on the RFA certification in the Proposing Release.[963] Although some commenters asserted that certain of the Proposed Amendments would be unduly burdensome for smaller and non-institutional beneficial owners,[964] those commenters did not indicate (or provide data that would suggest) that those beneficial owners would be small entities for purposes of the RFA. Thus, those comments do not alter our belief that the vast majority of the beneficial owners that will be subject to the amendments will not be small entities for purposes of the RFA. In addition, the final amendments include some modifications to the Proposed Amendments. As discussed in more detail in Section II above, we are not adopting proposed Rule 13d-3(e), nor are we adopting many of the proposed amendments to Rules 13d-5 and 13d-6. We also have adopted longer deadlines than proposed for initial and amended Schedule 13G filings. We believe these modifications generally would reduce any burdens of the final amendments in the event any small entity becomes subject to them. Moreover, we do not believe that these modifications alter the basis upon which the Commission made the certification in the Proposing Release.

For the foregoing reasons, the Commission certifies, pursuant to 5 U.S.C. 605(b), that the final amendments will not have a significant economic impact on a substantial number of small

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963 Proposing Release at 13896.

964 *See, e.g.*, letters from A. Day; E. Fraser; MFA; *see also* letters from B. Mason; S. Thornburg.

entities for purposes of the RFA.

Statutory Authority

We are adopting the rule amendments contained in this release under the authority set forth in Sections 3(b), 13, and 23(a) of the Exchange Act.

List of Subjects

17 CFR Part 232

Administrative practice and procedure, Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Reporting and recordkeeping requirements, Securities.

TEXT OF AMENDMENTS

For the reasons set out in the preamble, the Commission is amending title 17, chapter II, of the Code of Federal Regulations as follows:

PART 232—REGULATION S-T—GENERAL RULES AND REGULATIONS FOR ELECTRONIC FILINGS

1. The general authority citation for part 232 continues to read as follows:

Authority: 15 U.S.C. 77c, 77f, 77g, 77h, 77j, 77s(a), 77z-3, 77sss(a), 78c(b), 78*l*, 78m, 78n, 78o(d), 78w(a), 78*ll*, 80a-6(c), 80a-8, 80a-29, 80a-30, 80a-37, 80b-4, 80b-6a, 80b-10, 80b-11, 7201 *et seq.*; and 18 U.S.C. 1350, unless otherwise noted.

* * * * *

2. Amend § 232.13 by revising paragraph (a)(4) to read as follows:

§232.13 Date of filing; adjustment of filing date.

(a) * * *

(4) Notwithstanding paragraph (a)(2) of this section, a Form 3, 4, or 5 (referenced in §§ 249.103, 249.104, and 249.105 of this chapter, respectively), a Schedule 14N (referenced in § 240.14n-101 of this chapter), a Form 144 (referenced in § 239.144 of this chapter), or a Schedule 13D or Schedule 13G, inclusive of any amendments thereto (§§240.13d-101 and 240.13d-102 of this chapter) submitted by direct transmission commencing on or before 10 p.m. eastern standard time or eastern daylight time, whichever is currently in effect, shall be deemed filed on the same business day.

§ 232.201 [Amended]

3. Amend § 232.201(a) introductory text by:

a. Removing the word "or" that immediately precedes "an Asset Data File"; and

b. Adding after the phrase "Asset Data File (as defined in § 232.11)," the phrase "or a Schedule 13D or Schedule 13G (§§240.13d-101 and 240.13d-102 of this chapter),".

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for part 240 continues to read, in part, as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78j-4, 78k, 78k-1, 78*l*, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78dd, 78*ll*, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

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Section 240.13d-3 is also issued under Public Law 111-203 § 766, 124 Stat. 1799 (2010).

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5. Amend § 240.13d-1 by revising paragraphs (a), (b)(1)(i), (b)(1)(iii), (b)(2), (c) introductory text, (d), (e)(1) introductory text, (e)(1)(ii), (f)(1), (g), (i), and (j) to read as follows:

§240.13d-1 Filing of Schedules 13D and 13G.

(a) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i)(1) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within five business days after the date of the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§240.13d-101).

(b) * * *

(1) * * *

(i) Such person has acquired such securities in the ordinary course of the person's business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b), other than activities solely in connection with a nomination under § 240.14a-11; and

* * * * *

(iii) Such person has promptly notified any other person (or group within the meaning of section 13(d)(3) of the Act) on whose behalf it holds, on a discretionary basis, securities exceeding five percent of the class, of any acquisition or transaction on behalf of such other person which might be reportable by that person under section 13(d) of the Act. This paragraph only requires notice to the account owner of information which the filing person reasonably should be expected to know and which would advise the account owner of an obligation such

account owner may have to file a statement pursuant to section 13(d) of the Act or an amendment thereto.

Instruction 1 to paragraph (b)(1). For purposes of paragraph (b)(1)(i) of this section, the exception for activities solely in connection with a nomination under § 240.14a-11 will not be available after the election of directors.

(2) The Schedule 13G filed pursuant to paragraph (b)(1) of this section shall be filed within 45 days after the end of the calendar quarter in which the person became obligated under paragraph (b)(1) of this section to report the person's beneficial ownership as of the last day of the calendar quarter, *provided*, that it shall not be necessary to file a Schedule 13G unless the percentage of the class of equity security specified in paragraph (i)(1) of this section beneficially owned as of the end of the calendar quarter is more than five percent; *however*, if the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities prior to the end of the calendar quarter, the initial Schedule 13G shall be filed within five business days after the end of the first month in which the person's direct or indirect beneficial ownership exceeds 10 percent of the class of equity securities, computed as of the last day of the month.

(c) A person who would otherwise be obligated under paragraph (a) of this section to file a statement on Schedule 13D (§240.13d-101) may, in lieu thereof, file with the Commission, within five business days after the date of an acquisition described in paragraph (a) of this section, a short-form statement on Schedule 13G (§240.13d-102). *Provided*, that the person:

* * * * *

(d) Any person who, as of the end of any calendar quarter, is or becomes directly or indirectly the beneficial owner of more than five percent of any equity security of a class specified in paragraph (i)(1) of this section and who is not required to file a statement under

paragraph (a) of this section by virtue of the exemption provided by Section 13(d)(6)(A) or (B) of the Act (15 U.S.C. 78m(d)(6)(A) or 78m(d)(6)(B)), or because the beneficial ownership was acquired prior to December 22, 1970, or because the person otherwise (except for the exemption provided by Section 13(d)(6)(C) of the Act (15 U.S.C. 78m(d)(6)(C))) is not required to file a statement, shall file with the Commission, within 45 days after the end of the calendar quarter in which the person became obligated to report under this paragraph (d), a statement containing the information required by Schedule 13G (§240.13d-102).

(e)(1) Notwithstanding paragraphs (b) and (c) of this section and §240.13d-2(b), a person that has reported that it is the beneficial owner of more than five percent of a class of equity securities in a statement on Schedule 13G (§240.13d-102) pursuant to paragraph (b) or (c) of this section, or is required to report the acquisition but has not yet filed the schedule, shall immediately become subject to paragraph (a) of this section and §240.13d-2(a) and shall file a statement on Schedule 13D (§240.13d-101) within five business days if, and shall remain subject to those requirements for so long as, the person:

* * * * *

(ii) Is at that time the beneficial owner of more than five percent of a class of equity securities described in § 240.13d-1(i)(1).

* * * * *

(f)(1) Notwithstanding paragraph (c) of this section and §240.13d-2(b), persons reporting on Schedule 13G (§240.13d-102) pursuant to paragraph (c) of this section shall immediately become subject to paragraph (a) of this section and §240.13d-2(a) and shall remain subject to those requirements for so long as, and shall file a statement on Schedule 13D (§240.13d-101)

within five business days after the date on which the person's beneficial ownership equals or exceeds 20 percent of the class of equity securities.

* * * * *

(g) Any person who has reported an acquisition of securities in a statement on Schedule 13G (§240.13d-102) pursuant to paragraph (b) of this section, or has become obligated to report on Schedule 13G (§240.13d-102) but has not yet filed the Schedule, and thereafter ceases to be a person specified in paragraph (b)(1)(ii) of this section or determines that it no longer has acquired or holds the securities in the ordinary course of business shall immediately become subject to paragraph (a) or (c) of this section (if the person satisfies the requirements specified in paragraph (c)) and §240.13d-2 (a), (b), or (d), and shall file, within five business days thereafter, a statement on Schedule 13D (§240.13d-101) or amendment to Schedule 13G, as applicable, if the person is a beneficial owner at that time of more than five percent of the class of equity securities.

* * * * *

(i)(1) For the purpose of this section, the term "equity security" means any equity security of a class which is registered pursuant to section 12 of that Act, or any equity security of any insurance company which would have been required to be so registered except for the exemption contained in section 12(g)(2)(G) of the Act, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940; *provided*, such term shall not include securities of a class of non-voting securities.

(2) For the purpose of this section, the term "business day" means any day, other than Saturday, Sunday, or a Federal holiday, from 12:00 a.m. to 11:59 p.m., eastern time.

(j) For the purpose of sections 13(d) and 13(g) of the Act, any person, in determining the amount of outstanding securities of a class of equity securities, may rely upon information set forth in the issuer's most recent quarterly or annual report, and any current report subsequent thereto, filed with the Commission pursuant to this Act, unless such person knows or has reason to believe that the information contained therein is inaccurate.

* * * * *

6. Amend § 240.13d-2 by:

a. Revising paragraphs (a), (b), (c), and (d); and

b. Removing the sectional authority citation from the end of the section.

The revisions read as follows:

§240.13d-2 Filing of amendments to Schedules 13D or 13G.

(a) If any material change occurs in the facts set forth in the Schedule 13D (§240.13d-101) required by §240.13d-1(a), including, but not limited to, any material increase or decrease in the percentage of the class beneficially owned, the person or persons who were required to file the statement shall file or cause to be filed with the Commission an amendment disclosing that change within two business days after the date of such change. An acquisition or disposition of beneficial ownership of securities in an amount equal to one percent or more of the class of securities shall be deemed "material" for purposes of this section; acquisitions or dispositions of less than those amounts may be material, depending upon the facts and circumstances.

(b) Notwithstanding paragraph (a) of this section, and provided that the person filing a Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b) or §240.13d-1(c) continues to meet the requirements set forth therein, any person who has filed a Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b), §240.13d-1(c), or §240.13d-1(d) shall amend the statement within 45

days after the end of each calendar quarter if, as of the end of the calendar quarter, there are any material changes in the information reported in the previous filing on that Schedule; *provided, however,* that an amendment need not be filed with respect to a change in the percent of the class outstanding previously reported if the change results solely from a change in the aggregate number of securities outstanding. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required unless the person thereafter becomes the beneficial owner of more than five percent of the class and is required to file pursuant to §240.13d-1.

(c) Any person relying on §240.13d-1(b) that has filed its initial Schedule 13G (§240.13d-102) pursuant to §240.13d-1(b) shall, in addition to filing any amendments pursuant to §240.13d-2(b), file an amendment on Schedule 13G (§240.13d-102) within five business days after the end of the first month in which the person’s direct or indirect beneficial ownership, computed as of the last day of the month, exceeds 10 percent of the class of equity securities. Thereafter, that person shall, in addition to filing any amendments pursuant to §240.13d-2(b), file an amendment on Schedule 13G (§240.13d-102) within five business days after the end of the first month in which the person's direct or indirect beneficial ownership, computed as of the last day of the month, increases or decreases by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (c).

(d) Any person relying on §240.13d-1(c) that has filed its initial Schedule 13G (§240.13d-102) pursuant to §240.13d-1(c) shall, in addition to filing any amendments pursuant to paragraph (b) of this section, file an amendment on Schedule 13G (§240.13d-102) within two business days after acquiring, directly or indirectly, greater than 10 percent of a class of equity

securities specified in §240.13d-1(d), and thereafter within two business days after increasing or decreasing its beneficial ownership by more than five percent of the class of equity securities. Once an amendment has been filed reflecting beneficial ownership of five percent or less of the class of securities, no additional filings are required by this paragraph (d).

* * * * *

7. Amend § 240.13d-3 by:

a. Revising paragraph (d)(3) introductory text and paragraph (d)(4); and

b. Removing the sectional authority citation from the end of the section.

§240.13d-3 Determination of beneficial owner.

* * * * *

(d) * * *

(3) A person who in the ordinary course of such person's business is a pledgee of securities under a written pledge agreement shall not be deemed to be the beneficial owner of such pledged securities until the pledgee has taken all formal steps necessary which are required to declare a default and determines that the power to vote or to direct the vote or to dispose or to direct the disposition of such pledged securities will be exercised, provided, that:

* * * * *

(4) A person engaged in business as an underwriter of securities who acquires securities through such person's participation in good faith in a firm commitment underwriting registered under the Securities Act of 1933 shall not be deemed to be the beneficial owner of such securities until the expiration of 40 days after the date of such acquisition.

8. Revise § 240.13d-5 to read as follows:

§240.13d-5 Acquisition of beneficial ownership.

(a) A person who becomes a beneficial owner of securities shall be deemed to have acquired such beneficial ownership for purposes of section 13(d)(1) of the Act, whether such acquisition was through purchase or otherwise. However, executors or administrators of a decedent's estate generally will be presumed not to have acquired the beneficial ownership held by the decedent's estate until such time as such executors or administrators are qualified under local law to perform their duties.

(b)(1)(i) When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons.

(ii) A group regulated as a person pursuant to section 13(d)(3) of the Act shall be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section and for purposes of sections 13(d)(1) and (2) of the Act, if any member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group after the group's formation. The beneficial ownership so acquired shall be reported as being held by the group through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(iii) Notwithstanding paragraph (b)(1)(ii) of this section, a group regulated under section 13(d)(3) of the Act shall not be deemed to have acquired beneficial ownership, as determined under paragraph (a) of this section, if, after the group's formation, a member of the group

becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group through a sale by or transfer from another member of the group.

(2)(i) A group regulated as a person pursuant to section 13(g)(3) of the Act shall be deemed to have become the beneficial owner, for purposes of sections 13(g)(1) and (2) of the Act, if any member of the group becomes a beneficial owner of additional equity securities in the same class held by the group after the group's formation and through the earlier of {x} the date of the group's dissolution or {y} the date of that member's withdrawal from the group.

(ii) Notwithstanding paragraph (b)(2)(i) of this section, a group regulated under section 13(g)(3) of the Act shall not be deemed to have become the beneficial owner of additional equity securities in the same class beneficially owned by the group if, after the group's formation, a member of the group becomes the beneficial owner of additional equity securities in the same class beneficially owned by the group through a sale by or transfer from another member of the group.

9. Revise § 240.13d-6 to read as follows:

§240.13d-6 Exemption of certain acquisitions.

(a) The acquisition of securities of an issuer by a person who, prior to such acquisition, was a beneficial owner of more than five percent of the outstanding securities of the same class as those acquired shall be exempt from section 13(d) of the Act; provided, that:

(1) The acquisition is made pursuant to preemptive subscription rights in an offering made to all holders of securities of the class to which the preemptive subscription rights pertain;

(2) Such person does not acquire additional securities except through the exercise of such person's pro rata share of the preemptive subscription rights; and

(3) The acquisition is duly reported, if required, pursuant to section 16(a) of the Act and the rules and regulations thereunder in this part.

(b) A group shall be deemed not to have acquired any equity securities beneficially owned by the other members of the group solely by virtue of their concerted actions relating to the purchase of equity securities directly from an issuer in a transaction not involving a public offering; provided, that:

(1) All the members of the group are persons specified in § 240.13d-1(b)(1)(ii);

(2) The purchase is in the ordinary course of each member's business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect, including any transaction subject to § 240.13d-3(b);

(3) There is no agreement among or between any members of the group to act together with respect to the issuer or its securities except for the purpose of facilitating the specific purchase involved; and

(4) The only actions among or between any members of the group with respect to the issuer or its securities subsequent to the closing date of the non-public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities.

§ 240.13d-7 [Removed and Reserved]

10. Remove and reserve § 240.13d-7.

11. Amend § 240.13d-101 by:

a. Removing the note that reads "Note: Schedules filed in paper format shall include a signed original and five copies of the schedule, including all exhibits. See Rule 13d–7 for other parties to whom copies are to be sent."; and

b. Revising Item 6 and the paragraph following the "Name/Title" block to read as follows:

§ 240.13d-101 Schedule 13D—Information to be included in statements filed pursuant to § 240.13d-1(a) and amendments thereto filed pursuant to § 240.13d-2(a).

* * * * *

Item 6. Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer. Describe any contracts, arrangements, understandings, or relationships (legal or otherwise) among the persons named in Item 2 and between such persons and any person with respect to any securities of the issuer, including any class of such issuer's securities used as a reference security, in connection with any of the following: call options, put options, security-based swaps or any other derivative securities, transfer or voting of any of the securities, finder's fees, joint ventures, loan or option arrangements, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, understandings, or relationships have been entered into. Include such information for any of the securities that are pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities except that disclosure of standard default and similar provisions contained in loan agreements need not be included.

* * * * *

The original statement shall be signed by each person on whose behalf the statement is filed or such person's authorized representative. If the statement is signed on behalf of a person by such person's authorized representative (other than an executive officer or general partner of the filing person), evidence of the representative's authority to sign on behalf of such person shall be filed with the statement; *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath such person's signature.

* * * * *

12. Amend § 240.13d-102 by:

a. Removing the note at the end of the section that reads "Note: Schedules filed in paper format shall include a signed original and five copies of the schedule, including all exhibits. See Rule 13d-7 for other parties for whom copies are to be sent."; and

b. Revising Item 8 and the paragraph following the "Name/Title" block to read as follows:

§ 240.13d-102 Schedule 13G—Information to be included in statements filed pursuant to § 240.13d-1(b), (c), and (d) and amendments thereto filed pursuant to § 240.13d-2.

* * * * *

Item 8. Identification and Classification of Members of the Group

If a group has filed this schedule pursuant to § 240.13d-1(b)(1)(ii)(K), so indicate under Item 3(k) and attach an exhibit stating the identity and Item 3 classification of each member of the group. If a group has filed this schedule pursuant to Rule 13d-1(c) or Rule 13d-1(d), attach an exhibit stating the identity of each member of the group.

* * * * *

The original statement shall be signed by each person on whose behalf the statement is filed or such person's authorized representative. If the statement is signed on behalf of a person by such person's authorized representative other than an executive officer or general partner of the filing person, evidence of the representative's authority to sign on behalf of such person shall be filed with the statement; *provided, however,* that a power of attorney for this purpose which is already on file with the Commission may be incorporated by reference. The name and any title of each person who signs the statement shall be typed or printed beneath such person's signature.

* * * * *

By the Commission.

Dated: October 10, 2023.

Vanessa A. Countryman,

Secretary.